SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

HARRY O. PAULY, PETITIONER,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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[fol. 1]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH.

HARRY O. PAULY, Plaintiff,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of the Denver & Rio Grande Western Railroad Company, a corporation, Defendants.

COMPLAINT—Filed March 13, 1944

Plaintiff complains of defendants, and for cause of action alleges:

1. That at all times herein mentioned the defendant, Denver & Rio Grande Western Railroad Company, was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and authorized to do business in the State of Utah as a foreign corporation, with its principal place of business in Utah at Salt Lake City, Utah, and that prior to the occurrence of the grievance herein complained of, the defendants, Wilson McCarthy and Henry Swan, were duly appointed trustees of all the property of the defendant, Denver & Rio Grande Western Railroad Company, by the United States District Court for the District of Colorado in reorganization proceedings then and therein pending under the provisions of Section 77, Chapter VIII, of the Federal Bankruptcy Act, as amended, and that at all times herein mentioned all of the property of the defendant, Denver & Rio Grande Western Railroad Company, was in the possession and control of said defendant trustees, and said defendant trustees ever since their said appointment have been, and now are, operating the railroad and all of the property of the defendant, Denver & Rio Grande Western Railroad Company, under the orders and directions of the said United States District Court.

2. That on the tracks of the defendant where the accident hereinafter alleged occurred, defendants at all times herein mentioned maintained and do now maintain a highway of

interstate commerce, and that at all times herein mentioned the plaintiff, Harry O. Pauly, and defendants, and each of them, were engaged in interstate commerce and transportation.

3. That at all times herein mentioned defendants were and now are engaged in interstate commerce and transportation in the States of Colorado and Utah, and plaintiff was [fol. 2] employed by defendants in such commerce at all times herein mentioned in the said State of Colorado. That the injuries to plaintiff herein complained of arose in the course of and while plaintiff and said defendants were engaged in the conduct of such interstate commerce and transportation and while said defendants were operating as a common carrier by railroad in interstate commerce.

4. That this action is brought under and by virtue of the provisions of the Federal Employers' Liability Act (45 USCA, 51 et seq).

5. That at all times herein mentioned the defendants maintained and used in their said business certain mainline railroad tracks running in a generally easterly and westerly direction from Funston to and beyond Chacra in the State of Colorado. That at Chacra defendants maintain a siding or passing track which is parallel with and about 12 feet north of the main line. That said passing track is approximately a mile in length from switch point to switch point and is capable of accommodating a train consisting of approximately one hundred seven cars. That at a point approximately eighteen hundred feet west of the east switch point, said main line and passing tracks cross a certain creek over a bridge which is approximately twenty feet above the creek bed. That on the banks and bed of said creek are many boulders of various sizes and shapes. That said bridge is constructed and maintained without walks or handrails on the sides thereof and the width of said bridge is such that when a railroad car is upon the tracks passing over said bridge the outside of said car is flush with the outside of said bridge and that at the time of the occurrence of the grievance herein complained of, there were no lights or markers indicating the presence or the dimensions of said bridge and at said time it was exceptionally dark and a heavy and violent snow storm was in progress.

6. That at all times on the 27th day of January, 1944, and at the time of the occurrence of the grievance herein complained of, plaintiff was employed by the defendants as a conductor on defendants' west-bound Red Ball freight train designated as 2nd Ute 27, consisting of Diesel Motor No. 545, eighty-six freight cars and a caboose. That about the hour of eleven-forty o'clock P. M. on said day and while plaintiff and other employees of the defendants were en- [fol. 3] gaged in operating said train on the tracks of the defendants between Funston and Chacra, Colorado, the rear brakeman on said train discovered that a brake on one of the cars in said train was sticking. Whereupon said rear brakeman notified plaintiff of the condition of said brake and plaintiff thereupon placed a lighted red fuse on the left side of the caboose in order to signal the engineer and fireman on said Diesel Engine to bring said train to a stop. That acting upon the signal given by plaintiff aforesaid, the defendants' engineer caused said train to be brought to a stop at a time when the said caboose upon which plaintiff was then and there riding was upon the bridge aforesaid, and that owing to the weather conditions and the darkness of the night as aforesaid, it was impossible for plaintiff to discover or ascertain the fact with regard to the place where said caboose had been brought to a stop, and plaintiff had no knowledge and did not know that the said caboose had been and was stopped upon said bridge.

7. That it thereupon became and was the duty of the plaintiff as the conductor of said train to dismount from said caboose and to go westward along said train to examine the brakes which were sticking as aforesaid and to then determine what if any action should be taken with reference to said car and the brakes thereof. That at said time defendants' east-bound passenger train No. 20 was passing said freight train over, upon and along the said passing track immediately to the north of the main line tracks upon which defendants' Red Ball freight train was standing as aforesaid, and for that reason it would have been extremely dangerous and impractical for plaintiff to have dismounted from said caboose on the right side thereof.

8. That the plaintiff then and there in the discharge of his duties as aforesaid stepped off the left front steps of the caboose, and due to the carelessness, negligence and

recklessness of the defendants at said time and place was caused to and did fall headlong onto the bed of the creek below and was thereby and thus caused to suffer the grievous injuries and damages hereinafter alleged.

9. That the said defendants, and each and all of them, were careless, reckless and negligent at said time and place [fol. 4] in the operation and maintenance of their said tracks, roadbed and equipment in the following particulars:

B. That the defendants, and each and all of them, negligently, carelessly and recklessly failed and neglected to furnish plaintiff a safe place whereon and wherein to perform the duties necessarily incident to his said employment in this: that said defendants well knowing that their passenger and freight trains were customarily and ordinarily stopped upon defendants' main line and passing tracks between the east and west switch points at Chacra, Colorado at all times of the day and night and in all kinds of weather, and that it was usual, customary and necessary for members of various train crews to pass along said trains while they were so stopped upon said main line and said passing track for the purpose of examining said trains and the various cars therein, and that said bridge in darkness was indistinguishable, dangerous and hazardous, nevertheless wholly failed to make said bridge safe and wholly failed and neglected to build, construct and maintain a walk with handrails on the sides of said bridge and did wholly fail and neglect to provide any lights or markers to indicate the presence or the dimensions of said bridge and did wholly fail and neglect to provide any other means whatsoever to give warning of the existence or the dangers of said structure or to protect and shield their employees from the dangers thereof, as a result whereof the plaintiff while in the discharge of his duties was caused to and did fall headlong from the caboose of his said train over the edge of said bridge and onto the bed of said creek resulting in the damages and injury to him as herein complained of.

10. That the aforesaid negligent, careless, heedless and reckless acts and conduct on the part of the defendants in the use, maintenance, management and operation of its said tracks, roadbed and equipment combined and concurring was and is the direct and proximate cause of the injury and damage suffered by the plaintiff as herein set forth.

11. That as a direct and proximate result of the carelessness and negligence of defendants, as aforesaid, the plaintiff was rendered sick, sore, lame, disabled and disordered, both externally and internally, and received the following personal injuries, to-wit: a compression fracture of the first lumbar vertebra and serious injury to his [fol. 5] spinal chord in the region of said fracture and complications internally, also cuts, bruises, contusions and lacerations over his hips, legs, shoulders and back. That as a result of the said compression fracture of the first lumbar vertebra and injury to his spinal chord plaintiff has suffered partial paralysis to his lower limbs and a partial loss of the control of his bowels and urinary affairs.

12. Plaintiff further alleges that as a direct and proximate result of the carelessness and negligence of the defendants, as herein set forth, he suffered a severe shock to his nervous system and an injury and impairment to his general health, and that he has suffered mental and physical pain and torment ever since said accident occurred, and is reasonably certain that he will suffer mental and physical pain for a long time in the future, and that due to his injuries aforesaid, the plaintiff has been disabled ever since said accident and up to the present time, and that it is reasonably certain that he will be and continue to be disabled as a railroad conductor, and that by reason of his injuries aforesaid will be unable to engage in any gainful occupation for a long period of time, the exact time being at present to plaintiff unknown.

13. That prior to said accident and injuries plaintiff was a strong, able bodied and healthy young man of thirty-six years of age, earning and capable of earning as a conductor approximately Four Thousand Dollars ($4,000.00) per year. That plaintiff has been without any income from his employment upon which he was dependent for a livelihood from the time of said accident up to the present time, and it is reasonably certain that he will be so disabled for an indefinite period of time in the future, the exact time being unknown to plaintiff, and that by reason of all of the foregoing, plaintiff has been damaged in the sum of Seventy-five Thousand ($75,000.00) Dollars.

Wherefore: Plaintiff prays judgment against the said defendants, and each of them, in the sum of Seventy-five

Thousand ($75,000) Dollars and for costs of Court herein incurred.

Rawlings, Wallace & Black, Attorneys for Plaintiff, 530 Judge Building, Salt Lake City, Utah.

(Duly verified.)

[fol. 6] In District Court of Salt Lake County

Answer of Defendant Trustees—Filed May 10, 1944

Come now Wilson McCarthy and Henry Swan, Trustees of the property of The Denver and Rio Grande Western Railroad Company, and answer the complaint on file herein as follows (inasmuch as the court granted the motion of these defendants to strike from the complaint all allegations therein pertaining to the defendant named in the complaint, The Denver and Rio Grande Western Railroad Company, this answer is not addressed to such allegations):

1. Admit the allegations contained in paragraphs 1, 2, 3 and 4.

2. Answering paragraphs 5, 6, 7 and 8 admit that defendants maintained and used main line railroad tracks from Funston to and beyond Chacra in Colorado; that at Chacra defendants maintain a passing track north of the main line; that said main line and passing track cross over a bridge; that plaintiff on January 27, 1944, was employed by defendants as a conductor on west bound freight train No. 27 consisting of Diesel Motor No. 545, 86 flat cars and a caboose; that the train men on said freight train between Funston and Chacra discovered fire under a car in said train; that plaintiff signaled with a lighted red fusee to stop the train; that pursuant to such signal said train was stopped; and that plaintiff stepped off the left front steps of the caboose of said train and fell into the bed of the creek below. Deny each and every other allegation therein contained.

3. Answering paragraph 9, with the exception of subparagraph A thereof, which has been stricken therefrom by order of this court, defendants deny each and every allegation therein contained.

4. Deny each and every allegation contained in paragraph 10.

5. Answering paragraphs 11, 12 and 13 defendants admit that as a result of said fall plaintiff suffered certain personal injuries, the extent of which are unknown to defendants; that plaintiff had an earning capacity and that he has been disabled from following his occupation up to the present time. Deny each and every other allegation therein contained.

6. Further answering said complaint these defendants allege that if plaintiff suffered injuries and has been dam- [fol. 7] aged as alleged in the complaint, that plaintiff's own failure to exercise due care contributed to such injuries and damages and was a proximate cause thereof.

7. Further answering said complaint defendants allege that if plaintiff suffered injuries and was damaged as alleged therein, said plaintiff's own failure to exercise due care was the sole proximate cause thereof.

8. Further answering said complaint defendants allege that if plaintiff suffered injuries and was damaged as alleged therein, such injuries and damages were proximately caused by the failure of plaintiff to comply with each of the following rules of the defendants' Operating Department:

(a) Rule B of the Safety Rules, which reads:

> Safety must be the first consideration in every department of the service. In all cases, the safest available methods must be followed. In case of doubt or uncertainty, the safe course must be followed.

(b) Rule D of the Safety Rules, which reads:

> An employe who is careless of his own safety or that of others will not be allowed to remain in the service. Employes must not rely upon the carefulness of others, but must protect themselves when their own safety is involved.

(c) Rule 3 of the Safety Rules, which reads:

> Before getting on or off equipment, employes must look out for safe footing, obstructions, or equipment moving on other tracks. When practicable, they must board or alight from rear of car or engine.

(d) Rule M of Operating Rules and Regulations, which reads:

> Employes must exercise care to avoid injury to themselves or others by observing the condition of facilities, equipment, and the tools which they use in performing their duties, and when found defective, will, if practicable, put them in safe condition, reporting defects to the proper authority.
>
> They must inform themselves as to the location of structures and obstructions where clearances are close.
>
> They must expect trains or engines to run at any time, on any track, in either direction, and must not rely on others to notify them of the approach of a train or engine.
>
> They must not stand on the track in front of an approaching engine or car for the purpose of boarding same.
>
> Every precaution must be taken to prevent injury to employes, and they are prohibited from doing any work in a manner that might jeopardize their safety.

(e) Rule 807 of Operating Rules and Regulations, which reads:

> Notice is hereby given that at some points on this line there are platforms, sheds, roofs, water tank, frames, telegraph poles, bridges, scales, mail cranes, canyon walls, tunnels, cars, high voltage wires, and other obstructions, which may be dangerous, and employes must inform themselves as to location of such obstructions and use due care to avoid injury thereby. [fol. 8] A list of obstructions that are considered especially dangerous will be printed in the time-table. Also, there are cattle-guards and uncovered drains on main tracks and side tracks, and employes are hereby notified to advise themselves thereof.

Wherefore, defendants pray that they be dismissed with their costs.

Farnsworth and Van Cott, Grant H. Bagley, Attorneys for defendants.

(Duly verified.)

IN DISTRICT COURT OF SALT LAKE COUNTY

VERDICT—Filed September 29, 1944

We, the Jurors impaneled in the above case, find the issues in this case in favor of the plaintiff and against the defendants, and assess his damages as follows:

General Damages, if any	$75,000
Less reduction for contributory negligence, if any	$25,000
Net Verdict	$50,000

Dated September 28, 1944.

Leon J. Dunn, Foreman.

We, the Jurors impaneled in the above case, find the issues in this case in favor of the defendants and against the plaintiff, "No Cause of Action."

Dated September 28, 1944.

——, Foreman.

IN DISTRICT COURT OF SALT LAKE COUNTY

DEFENDANTS' MOTION FOR DIRECTED VERDICT—Filed September 28, 1944

Come now the defendants, Wilson McCarthy and Henry Swan, Trustees of The Denver and Rio Grande Western Railroad Company, a corporation, and each of them, and move the court to instruct the jury to return a verdict in their favor and against the plaintiff of no cause of action. This motion is based upon the following grounds:

[fol. 9] 1. No evidence has been introduced which proves or tends to prove that any negligence of the defendants or either of them was the proximate cause of any personal injury or other damage suffered by plaintiff.

2. No evidence has been introduced which proves or tends to prove that the defendants or either of them were negligent in failing to equip the bridge in question with a walkway or guard rails, or in failing to maintain a light or other warning device at said bridge.

3. No evidence has been introduced which proves or tends to prove any defect in the road bed or the bridge in question.

4. No evidence has been introduced which proves or tends to prove any duty on the part of the defendants or either of them to maintain a walkway or rails along said bridge, or to place a light or other warning device on said bridge, or that the defendants or either of them should have reasonably anticipated that the plaintiff in the performance of his duties would step off the caboose into space while the caboose was standing on the bridge.

5. No evidence has been introduced which proves or tends to prove that the defendants or either of them failed to exercise due care to provide the plaintiff a reasonably safe place in which to perform his work.

6. No evidence has been introduced which proves or tends to prove that the absence of a walkway or guard rail or a light or other warning device on the bridge in question constituted negligence on the part of the defendants or either of them.

7. The uncontradicted evidence establishes as a matter of law that the proximate cause of all damages and injuries suffered by the plaintiff was his stepping from the caboose without knowing or making any effort to ascertain its position or location or the character or condition of the area into which he was thus stepping and without knowing or making any effort to learn where or upon what he would alight, or otherwise taking any precaution for his own safety.

Farnsworth & Van Cott, Attorneys for Defendants.

[fol. 10] In District Court of Salt Lake County

Order Denying Motion for Directed Verdict—Filed September 28, 1944

The trial of this case having been continued to this time, the jury heretofore impaneled, respective counsel and all interested parties being present, further trial is now resumed. Harry O. Pauly is recalled and further testifies in his own behalf. Carl D. Schettler is sworn and testifies in plaintiff's behalf. W. T. Linkins and Mrs. Florence Pauly are recalled and further testify in plaintiff's behalf. Documentary proof is offered and received in evidence in plain-

tiff's behalf. Plaintiff rests. Counsel for defendant makes his opening statement to the Court and jury. Whereupon Lawrence N. Ossman, is sworn and testifies in defendants' behalf.

The deposition of Harry O. Pauly is opened in Court and it is ordered that certain portions of said deposition is made part of the record. Documentary proof is offered and received in evidence in defendant's behalf. Defendants rests. Plaintiff rests. Both sides rest. Come now counsel for the defendants and move the Court for a directed verdict in favor of the defendants and against the plaintiff, "no cause of Action". Said motion is argued to the Court by respective counsel and said motion is by the Court denied.

The Court instructs the jury in writing, the case is argued to the Court and jury by respective counsel and submitted and at the hour of 4:15 o'clock P. M., the jury retires to consider of its verdict and at the hour of 5:15 o'clock P. M., the jury returns into open Court. Judge Ray Van Cott, sitting in place of J. Allan Crockett, to receive the verdict. The jury by their foreman says:

> "We, the Jury impaneled in the above case, find the issues in this case in favor of the plaintiff and against the defendants and assess his damages as follows:
>
> | | |
> |---|---|
> | General Damages | $75,000.00 |
> | Less reduction for contributory negligence, if any | 25,000.00 |
> | Net Verdict | $50,000.00 |
>
> Dated: September 28, 1944.
>
> Signed: Leon J. Dunn, Foreman."

The jury is polled, each juror answering in the affirmative as to his verdict. Whereupon the jury is discharged from further jury duty in this case and excused until called.

[fol. 11] IN DISTRICT COURT OF SALT LAKE COUNTY

INSTRUCTIONS AND EXCEPTIONS

Instruction No. 4

The statute under which this action is brought is known as the "Federal Employers' Liability Act," and said Act provides in substance as follows:

"Every common carrier by railroad while engaged in commerce between any of the several states or territories shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury resulting in whole or in part * * * by reason of any defect or insufficiency, due to its negligence, in its * * * cars, machinery, appliances, track, roadbed * * * or other equipment; and in all actions brought against such common carrier by railroad under or by virtue of the provisions of this Act to recover damages for personal injuries to any employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

Exceptions to Instruction to Jury No. 4

Defendants except to Instruction No. 4, and the whole thereof.

Defendants except to that part of Instruction No. 4, which reads as follows: "Cars, machinery, appliances, or other equipment."

Instruction No. 5

"Negligence" is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

"Ordinary care" implies the exercise of reasonable diligence, and implies such watchfulness, caution, and foresight as, under all the circumstances of the particular case, would be exercised by a reasonably careful, prudent person.

[fol. 12] "Contributory negligence" is defined to be where a person injured has proximately contributed to the injury by his want of ordinary care, so that, but for such want of ordinary care on his part, the injury would not have occurred.

By "proximate cause," you are instructed, is meant that cause which in a natural and continuous sequence, unbroken by any new and intervening cause, produced the injury, and, without which, the injury would not have occurred.

Instruction No. 6

You are instructed that the plaintiff has the burden of proving by a preponderance of the evidence as herein defined that the defendants or their employees other than the plaintiff, were guilty of negligence, as alleged in the plaintiff's complaint, and that such negligence was a proximate cause of the injury complained of to the said Harry O. Pauly; on the other hand, you are further instructed that the defendants have the burden of proving that the conduct and acts of the said Harry O. Pauly were contributorily negligent as herein defined; and that unless such negligence or contributory negligence is established by a preponderance of the evidence, you may not assume them to exist.

Negligence on the part of anyone is not to be inferred from the fact that an accident happened. The happening of the accident and the resulting injury to the plaintiff, Harry O. Pauly, are not evidence of negligence on the part of the defendants, nor evidence of contributory negligence on the part of Harry O. Pauly. Negligence, if any, and contributory negligence, if any, must be proved by a preponderance of the evidence in this case.

Instruction No. 7

The burden is on the plaintiff to prove by a preponderance of the evidence that he was injured as a direct and proximate result of the defendants' negligence complained of in the plaintiff's complaint, and that he was damaged thereby, and the burden is likewise upon him to prove by a preponderance of the evidence that he will hereafter suffer disability and be prevented from following his usual vocation, or other gainful occupation, and the period during which such disability, if any, will continue. In this con-

[fol. 13] nection, if you do so find that he will be disabled during any future period so that he will be unable to perform the work of a conductor, it will be his duty to seek other employment in any work he is then capable of performing, and thus minimize any damages to him because of loss of future earning capacity.

Instruction No. 9

You are instructed that it is the duty of a railroad company to exercise reasonable care to provide its employees with a reasonably safe place to work. This duty does not require the absolute elimination of all danger, but it does require the elimination of all dangers which the exercise of reasonable care by the railroad company would remove or guard against. In this connection, you are instructed that if you shall find from a preponderance of the evidence each of the following: (1) That the defendants could and should reasonably have anticipated that plaintiff or other members of its train crews in the performance of their duties would in the nighttime alight from one of their trains on the south side thereof while said train was upon the bridge at Chacra; and (2) that defendants failed to and did not keep and maintain the south side of said bridge in a reasonably safe condition in that said defendants did not keep and maintain on the south side of said bridge a foot walk, guard rail or light; and (3) that by reason of the failure of defendants to keep and maintain on the south side of said bridge a foot walk, guard rail or light, the defendants did not use reasonable care in providing its employees a safe place to work, then and in such an event, you may find that defendants were negligent, and if you shall find and believe from a preponderance of the evidence that defendants were thus negligent by their failure to keep the south side of said bridge in a reasonably safe condition for the use of their employees, as hereinabove set forth, and that such negligence proximately caused, in whole or in part, the injuries suffered by plaintiff, then you should find for the plaintiff and against the defendants and assess plaintiff's damages as in these instructions provided.

[fol. 14] Exceptions to Instruction to Jury No. 9

Mr. Bagley: Defendants except to Instruction No. 9 and the whole thereof.

Yes, defendants and each of them except to all of said instruction, which follows the first period therein, and begins with the words, "In this connection you are instructed", etc.

The Court: Just a minute, whereabouts. Oh, that is not the first period; that is the second period. There are two sentences there preceding that.

I will state it again. We except to all of said instruction which follows the first period therein, and begins with the words "In this connection you are instructed".

Defendants, and each of them, except to that portion of said Instruction No. 9 which is therein numbered "(1)", and begins with the words: "That the defendants could and should reasonably have anticipated", and ends with the word "Chacra".

Defendants, and each of them except to that portion of said instruction which is numbered "(2)", and begins with the words—which begins with the words, "that defendants failed", etc. And ends with the words, "guard rail or light".

Defendants, and each of them, except to the language contained in said portion of said Instruction No. 9, which reads as follows: "in that said defendants did not keep and maintain on the south side of said bridge a foot walk, guard rail or light".

Defendants, and each of them, except to that portion of said Instruction No. 9, which is therein numbered "(3)", and begins with the words, "that by reason of", etc., and ends with the words, "you may find that the defendants were negligent".

Defendants, and each of them, except to that portion of said Instruction No. 9, which reads as follows: "then, and in such event, you may find that defendants were negligent".

Defendants, and each of them, except to all that portion of said Instruction No. 9, which begins with the words, "if you shall find, and believe", etc., and ends with the words, "as in these instructions provided."

[fol. 15] Defendants, and each of them, except to the following language in Instruction No. 9, to-wit: "as herein-

above set forth", and which appear in said Instruction following the words "use of their employees", and preceding the words, "caused, in whole or in part", etc.

Instruction No. 10

You are instructed that plaintiff rested under the duty of exercising such degree of care for his own safety as would and should have been exercised by a reasonably prudent person of similar age, intelligence and experience under the same surrounding facts and circumstances, and if he failed to exercise such care and such failure was either the sole cause or in any degree proximately contributed to the happening of the accident, he was guilty of negligence.

If you find from the evidence that plaintiff failed to exercise due care for his own safety and that such failure on his part was the sole proximate cause of the accident which resulted in his injury, you must render a verdict of no cause of action in favor of the defendants and against plaintiff.

Instruction No. 11

Unless you find by a preponderance of the evidence that negligence on the part of the defendants alleged and complained of in plaintiff's complaint was a proximate cause of the accident which resulted in injuries to the plaintiff, you must render a verdict of no cause of action in favor of defendants and against plaintiff.

Instruction No. 12

If you find the issues in favor of the plaintiff and against the defendant, it will be your duty to award plaintiff such damages, if any, as you may find from a preponderance of the evidence will fairly and adequately compensate him for any injury and damage he has sustained as a proximate result of the defendant's negligence complained of by him. In determining the amount of such damages, you may consider the nature, character, and extent of the injuries and disabilities, if any, sustained by him, the degree and character of his suffering, both mental and physical, and its [fol. 16] probable duration and severity, and the extent to which he has been prevented or deprived, or in the future will be prevented or deprived, from engaging in and pursuing the ordinary and usual affairs of life as theretofore

enjoyed by him. You may likewise consider his actual loss of past earnings, and consider whether or not he has suffered any impairment of earning capacity which will diminish his capacity to earn money in the future.

The total amount of damages thus assessed for all of the above matters must not exceed the sum of $75,000, the amount prayed for in the plaintiff's complaint.

Exceptions to Instruction to Jury No. 12

Defendants except to Instruction No. 12 and the whole thereof.

Defendants, and each of them, except to that portion of Instruction No. 12 which is contained in the last paragraph thereof, beginning with the words, "The total amount", etc., and ending with the last word in the instruction.

Instruction No. 13

If you find by a preponderance of the evidence that defendants are liable to plaintiff in this case, it will be your duty to determine whether or not you believe from a preponderance of the evidence plaintiff was also guilty of negligence which proximately contributed to the happening of the accident. If you find that he was thus negligent, I say to you as a matter of law that you must determine the proportion in which the negligence of the defendants and of plaintiff, respectively, contributed to the happening of the accident, and diminish the amount of his damages in proportion to the amount of negligence attributable to the plaintiff.

In order to make clear to you what is meant by this comparison of negligence which under the Federal law the jury must make, I shall give to you the following illustrations; if the plaintiff's negligence contributed to or caused, we will say, the accident to the extent of one-third of the entire negligence, then the plaintiff's damages would be reduced by one-third; if to the extent of one-half, then his damages would be reduced by one-half; if to the extent of two-thirds, then his damages would be reduced by two-thirds; and if the plaintiff's negligence was alone the cause of the accident, then of course that would wipe out [fol. 17] the damages, and your verdict would be in favor of the defendants.

Instruction No. 17

You are instructed that no claim is made by the plaintiff that his personal injuries are of a permanent nature, or that he will be permanently disabled or permanently prevented from following the usual vocation or other gainful occupation, but should you find that the defendants are liable in this case and that plaintiff will during some future period be prevented as a result of his injuries from engaging in a gainful occupation, your conclusion as to the amount of impairment of his earning capacity and the duration thereof must be based upon evidence, and the burden of proving the same by a preponderance of evidence rests upon the plaintiff; if you are in doubt or unable to determine the length or the extent of such disability, you must resolve such doubt in favor of the defendants.

Respondent's Exceptions to the Instructions

Comes now the plaintiff, and excepts to the refusal of the court to grant his Instruction No. 3—I guess I will make that—I don't claim anything for it at all.

The Court: Is there anything further?

Mr. Black: Comes now—plaintiff excepts to that portion of Instruction No. 13 which states as follows: "In order to make clear to you what is meant by this comparison of negligence which under the Federal law the jury must make". And that is all.

In District Court of Salt Lake County

Judgment on Verdict—Filed September 29, 1944

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of 8 persons was regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called, answered to their names, and say they find a verdict for the plaintiff and against defendant.

[fol. 18] "We, the Jurors impaneled in the above case find the issues in this case in favor of the plaintiff and against the defendants, and assess his damages as follows:

General Damages, if any	$75,000.00
Less reduction for contributory negligence, if any,	25,000.00
Net Verdict	$50,000.00

Dated: September 28, 1944. Signed: Leon J. Dunn, Foreman".

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff have and recover from defendants the sum of $50,000.00 Dollars.

Judgment entered September 29, A. D. 1944.

IN DISTRICT COURT OF SALT LAKE COUNTY

NOTICE AND MOTION FOR NEW TRIAL—Filed October 3, 1944

To the plaintiff above named and to his attorneys, Rawlings, Wallace and Black:

You and each of you are hereby notified that the defendants in the above entitled action intend to and do hereby move the court to vacate and set aside the verdict of the jury and the judgment entered thereon in favor of the plaintiff and against the defendants and to grant said defendants a new trial. Said motion is and will be based upon the following grounds:

1. Irregularity in the proceedings of the court, the jury and the orders of the court and abuse of discretion by which the defendants were prevented from having a fair trial;

2. Misconduct of the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence material for the defendants which they could not with reasonable diligence have discovered and produced at the trial;

5. Excessive damages, appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict and judgment and that they and each of them are against law;

7. Error in law occurring at the trial and excepted to [fol. 19] by the defendants.

This motion is based upon the files and records in the case, the minutes of the court, and affidavits and evidence to be submitted at the hearing on said motion.

Farnsworth & Van Cott, Grant H. Bagley, Attorneys for Defendants.

In District Court of Salt Lake County

Minute Entry of Ruling on Motion for New Trial—Filed January 22, 1945

Defendant's motion for a new trial having heretofore been heard by this Court and taken under advisement; the Defendant and Plaintiff having filed their briefs, the Defendant having filed a reply brief. The Court now being fully advised in the premises: It is ordered that Defendant's motion for a new trial be and is hereby granted, unless the plaintiff within 20 days after notice hereof, files a consent that the jury's verdict in the sum of $50,000.00, heretofore rendered, be reduced to the sum of $34,500.00 and that the amount in excess thereof be remitted: Should the Plaintiff so consent the motion is denied.

Dated January 22, 1945.

J. Allan Crockett, Judge.

In District Court of Salt Lake County

Consent to Reduction of Verdict and Order Thereon—Filed January 30, 1945

Comes now the plaintiff, Harry O. Pauly, by and through his counsel, Rawlings, Wallace & Black, and hereby consents that the verdict of the jury heretofore rendered herein be reduced from $50,000.00 to $34,500.00 and hereby con-

sents that the amount in excess thereof, to-wit, $15,500.00, be remitted.

Rawlings, Wallace & Black, Attorneys for Plaintiff.

ORDER

Upon the filing of the above consent and good cause appearing therefor,

It Is Now Hereby Ordered that the verdict heretofore [fol. 20] rendered in the above entitled cause be reduced from $50,000.00 to $34,500.00 and that the amount in excess of the said $34,500.00, to-wit, $15,500.00, be remitted.

It Is Also Hereby Ordered that defendant's Motion for a New Trial be and it is now hereby denied.

Done in Open Court this 30th day of January, A. D. 1945.

J. Allan Crockett, Judge.

IN DISTRICT COURT OF SALT LAKE COUNTY

ORDER REDUCING VERDICT AND DENYING MOTION FOR NEW TRIAL—Filed January 30, 1945

Pursuant to the consent on file herein, and good cause appearing therefor, it is now ordered that the verdict heretofore rendered in the above entitled cause be reduced from $50,000.00 to $34,500.00, to-wit $15,500.00 to be remitted. Further, it is ordered that defendant's motion for a new trial be and it is hereby denied.

IN DISTRICT COURT OF SALT LAKE COUNTY

NOTICE OF DENIAL OF MOTION FOR NEW TRIAL—Filed January 31, 1945

To the defendants above named and to Farnsworth and Van Cott, their attorneys:

You and each of you will take notice hereby that the plaintiff has heretofore filed his Consent to the reduction of the verdict heretofore rendered herein from $50,000.00 to $34,500.00 and to the remittitur of the amount in excess of $34,500.00, namely, $15,500.00, and that upon the filing

of the above mentioned Consent to Reduction of Verdict, the Court duly made and entered its Order denying defendant's Motion for a New Trial.

Rawlings, Wallace & Black, Attorneys for Plaintiff.

In District Court of Salt Lake County

Notice of Appeal—Filed April 28, 1945

[fol. 21] To the Plaintiff Above Named and to His Attorneys, Rawlings, Wallace & Black:

You and each of you will please take notice that the defendants and each of them do hereby appeal to the Supreme Court of the State of Utah from the judgment made and entered in the above entitled court and cause in favor of plaintiff and against defendants made and entered on September 29, 1944, as amended by order of the court on January 30, 1945 and from the order of the court overruling defendant's motion for a new trial made and entered on January 30, 1945.

Farnsworth and Van Cott, Grant H. Bagley, Attorneys for Defendants.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] In District Court of Salt Lake County

Portions of the Bill of Exceptions

Be it Remembered, that on this the 25th day of September, 1944, at the hour of ten o'clock A. M., the above entitled cause came on regularly for hearing, before the Honorable J. Allan Crockett, one of the Judges of the above-named Court, sitting with a jury;

Appearances

For the Plaintiff: Parnell Black, Esq., and Calvin W. Rawlings, Esq.

For the Defendants: W. Q. Van Cott, Esq., and Grant H. Bagley, Esq.

A jury of eight, were duly called, sworn, examined and chosen to try the above entitled cause.

L. M. St. Clair, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. You may state your name your address and your occupation, please.

A. Name is Mr. L. M. St. Clair.

My address is Grand Junction, Colorado, and I am an engineer employed by the D. & R. G. Railroad.

Q. You are acquainted, Mr. St. Clair, with the siding at Chacra, Colorado, are you not?

A. Yes.

Q. Can you tell us how far that siding is west of Glenwood Springs?

A. Seven Miles.

Q. And how far is it west of Funston?

A. Well, it would be one mile less—Funston would be one mile west of Glenwood Springs, so be six miles.

Q. About six miles from Funston to Chacra. Can you tell the jury the length of the passing track at Chacra?

A. The length is approximately sixty-six hundred feet.

[fol. 23] Q. Sixty-six hundred feet. That is from switch point to switch point, as I understand it?

A. Yes.

Q. Will you tell the jury how far it is from the east switch point to the bridge?

A. I had that on my notes, but I don't remember at this time.

Q. Do you have the notes here in court?

A. I believe they are.

The Court: Is it eighteen hundred feet, do you remember.

Mr. Black: I just measured by automobile, I don't know.

A. I don't just remember what it was.

Q. Your notes right here in court?

A. Yes.

Mr. Black: I would like to have that evidence in, your Honor, now that we have someone here who has made the examination.

The Court: All right.

Q. Are you able now to state the answer to the question, Mr. St. Clair?

A. Approximately two thousand feet.

Q. Would that be to the eastern portion of the bridge?

A. That is to the east, about——

Q. The east limit, about two thousand feet?

A. That's right.

Q. Now, Mr. St. Clair, you have prepared a plan showing the surface and the side view of the bridge, have you not?

A. That's right.

Mr. Black: May your Honor let me have it marked Exhibit "A".

The Court: Put an "A" on it.

Mr. Black: We will offer it in due time.

Q. I direct attention, Mr. St. Clair, to the floor plan or the side view of the bridge that is on the board marked as Exhibit "A", and I will ask you if that is the plan that you drew?

A. That is the bridge; I made the fill notes, the plan was drawn in the Grand Junction office.

[fol. 24] Q. It is drawn to scale?

A. Yes.

Q. Will you just tell the jury, first, the width of the bridge from side to side. You may get down from there—the overall width of the bridge?

A. The overall width of the bridge would be 16, 1 plus 5 and 5, be 26 long.

Q. 26 long. Will you tell the jury the distance from the outside rail to the outside limit of the bridge?

A. From the rail to the——

Q. Yes.

A. 2, 7.

Q. Two feet and seven inches?

A. Two feet nine inches.

Q. Is that true on each side?

A. That is true on each side.

Q. Now, will you tell the jury the distance between the inside rails?

A. Inside rails, twelve.

Q. What is that?

A. Twelve. 16, 1, less 4, 7; that would be 11, 4.

Q. 11', 4". Will you describe for the jury the deck of the bridge between the ties?

A. Deck of the bridge covered with one-way plank.

Q. The map indicates that the tracks curve somewhat as they cross the bridge?

A. On 4 degree curve.

Q. On 4 degree curve. Now, the overall length of the bridge?

A. 92 feet six inches.

Q. 92 and six inches?

Mr. Van Cott: I don't think——

A. 92 feet and six inches.

Q. Now, do you know the name of the creek that the bridge passes over?

A. It is North Canyon Creek.

[fol. 25] Q. North Canyon Creek. I notice on the profile that you have indicated the distance from the bridge down to the creek bottom?

A. That's right.

Q. And go ahead and just tell the jury about that, will you please?

A. Well, the creek bottom would be from the top of the ties to the bottom of the creek, the center of the creek, 17 feet 3 inches, the Denver end of the bridge, 6 feet and 6 inches, the distance we are taking at each bent on the bridge.

Q. Each what?

A. Each bent. The support carries the bed, we had, ten feet ten.

The Court: Just take it a little slower.

A. On the second bent we have 13 feet and 8 inches, and on the third one, 15; 5—4th one, 15, 11; and on the fifth one 12, 4. These measurements were taken from the top of the tie to the ground line on the south side of the bridge.

Q. That is the down-stream side?

A. That is the down-stream side, this being——

Q. In other words, that stream flows from north to south?

A. North to south; railroad running from east to west, this being the eastern end of the bridge.

Q. Tell the jury how high the rails are above the top of the ties?

A. The rails would be six inches above the top of the ties.

Q. Will you describe for the jury the creek bed there?

A. This portion of the——

Q. You are referring to the Denver end?

A. The Denver end is, oh, unclassified material, as we call in railroad, small rocks, little dirt, some cinders get down to this point.

Q. That is the second bent?

A. That is the second bent, a few rods ahead in here is the creek bed, at this present time, that this was taken, water is between these two bents.

Q. You refer to the third and fourth bent?

[fol. 26] A. Yes; this filled in with large boulders, this side of the bridge being about the same as this one, some fine material, cinders, the boulders are in between these two bents.

Mr. Van Cott: When he says, "Between these two bents", he refers to the fourth and fifth bent; is that correct, Mr. Black?

A. That's right.

Mr. Black: Yes.

A Juror: Third and fourth.

A. Yes, third and fourth.

Mr. Van Cott: Third and fourth, pardon me; so that I will understand, you refer to this as a "bent"?

A. Yes.

Mr. Van Cott: The one most easterly, counting that as No. 1?

A. Between one and two, two and three, this would be four and five.

By Mr. Black:

Q. My questions are all on one bent, I thought you referred to that as "abutment".

A. Maybe better call them "supports". This is a support, and one from the center.

Mr. Van Cott: So that I may understand, the support t the extreme right of the map is called a "support", and o also at the extreme left of the map, and supports in etween, numbers 1, 2, 3, 4 and 5, are called "bents"; that it, and when the witness referred to the boulders nd the stream bed being in a certain position, he indicated etween the 3rd and 4th bent, just as the juror stated.

Mr. Black: That's right.

The Court: Speak out loud, you can't put nods in the ecord. You say "Yes"?

A. Yes.

By Mr. Black:

Q. Now, Mr. St. Clair, I want you to describe that urve in the roadbed as you come west from Funston toward ne bridge. That would be coming from Denver towards alt Lake, so the jury will have it in mind.

[Vol. 27] A. Well, curve is 4 degree curve to the left. You ean——

Q. West.

A. From Glenwood Springs, starting approximately eight undred feet east of the bridge. And running about the ame distance west of the bridge, curve being about six-en hundred feet long.

Q. As the tracks proceed west from Funston, they come own a canyon curve also to the left, don't they?

A. Yes.

Q. That is a big wide curve to the left as you come down at canyon?

A. Yes.

Q. In other words, a long train coming down that can-on, the rear end would have a view of the left side of the comotive?

A. Yes.

Q. But of course couldn't see the right side by——

A. No.

Q. They could see the crew and the left side of the pola, the caboose, could see the left side of the engine ead?

A. Only at certain times.

Q. I mean when coming around those curves to the t,—I believe that is all, Mr. St. Clair.

Cross-examination.

By Mr. Van Cott:

Q. Mr. St. Clair, the space between those two railroad tracks is occupied by what?

A. By 1 by 12 planking.

Q. Forming a bridge?

A. Yes.

Q. Forming a walk-way between the two tracks?

A. That's right.

Q. I show you a photograph marked for identification Exhibit "1", does that show the appearance of that walk-way or thoroughfare between the two railroad tracks?

A. It does.

[fol. 28] Mr. Van Cott: I offer in evidence Exhibit "1", Mr. Black.

Mr. Black: No objection.

The Court: It may be received. I understood you offered "A", too?

Exhibit "1"

(Here follows 1 photograph Exhibit "1".)

[fol. 29] Mr. Black: Yes, I want to offer Exhibit "A".

Mr. Van Cott: No objection. Show this to the jury, may I?

The Court: About "A"? No objection, it may be received.

Exhibit "A"

(Here follows a Plan of the Chacra, Colorado Bridge, Exhibit "A".)

[fol. 30] Mr. Van Cott: No further cross examination.

Mr. Black: Your Honor, I now offer in evidence the following exhibits, each of which is a photograph of the bridge, taken from the point indicated in the typewriting on the back. Exhibit B, which was taken from a point south——

The Court: Now, excuse me, I don't believe it is necessary to repeat in the record, if they are so marked.

Mr. Black: Offer the following Exhibits: "B," "C," "D," "E," "F," "H," "K" and "L."

Mr. Van Cott: I have no objection.

The Court: It is understood that they are photographs taken of that bridge, from the point indicated on the map.

(Hands to the jury.) Let me ask you this, is it necessary to show them to the jury at this time?

Mr. Black: I want to have the jury have the picture in mind as we develop the testimony.

The Court: In the interest of time, look at the first one, and keep them going around that way.

Mr. Black: Mr. Van Cott has supplied a group of photographs, I desire to offer them as one exhibit.

The Court: Exhibit "M" would that be, Mr. Clerk?

Court Clerk: Yes.

Mr. Black: "M," and on each photograph is an indication as to the point from which the photograph was taken.

The Court: It may be received in evidence. All of those exhibits mentioned.

Exhibits "B," "C," "D," "E," "F," "H," "K," and "L."

[Here follows 8 photographs, Exhibits "B," "C," "D," "E," "F," "H," "K" and "L."]

[fol. 31] L. M. St. Clair, was recalled as a witness, and testified further as follows:

Redirect examination.

By Mr. Black:

Q. Calling your attention to the map, Exhibit A, I will ask you if it isn't a fact that the creek—this Canyon Creek—is that what you call it?

A. North Canyon Creek.

Q. North Canyon Creek, flows from the north towards the south, as indicated on the map?

A. That's right.

Q. And it passes under the bridge going down towards the river?

A. Yes.

Q. Now, these directions on the map and photographs are all taken according to railroad directions?

A. Yes.

Q. And as was indicated before, on the railroad, all of the road, regardless of the actual direction, as it proceeds towards Denver, is an eastward movement, is it not?

A. Yes; it doesn't necessarily mean it is making an easterly direction.

Q. All the road, as it proceeds towards Salt Lake is a westward movement?

A. Yes.

Q. So, on the railroad, the only two directions you are interested in are east and west?

A. Yes.

Q. And you had that in mind, of course, as you placed the directions——

A. That's right.

Q. (Continued)—on the map. By the way, Mr. St. Clair, do you know the approximate—withdraw that question. In railroad language, what do you mean by the "overhang" of a car or an engine or a caboose?

A. The projection beyond the wheels, either front or back. [fol. 32] Q. That the extent that the car or engine protrudes out beyond the rail?

A. That's right.

Q. Do you know what is the overhang of a caboose, or an ordinary freight car?

A. No, I don't.

Q. Well, be some two and a half feet, along there, would it not?

A. Yes, approximately.

Q. Now, I believe you indicated that the distance from the rail to the outside edge of the ties was what, some two——

A. Two feet and nine inches.

Q. Two feet, nine inches.

Mr. Black: That's all.

Recross-examination.

By Mr. Van Cott:

Q. Did I understand you to say that you did not know what the overhang of railroad freight cars and the caboose would be?

A. Not to the very exact foot or inches, no.

Q. But you estimate that the overhang is about two—what did you say?

A. About two feet.

Q. About two feet?

A. Yes.

Further redirect examination.

By Mr. Black:

Q. Do you know the height of the floor of cabooses and freight cars above the rail?

A. Four feet.

Q. What is that?

A. About four feet, approximately.

Q. About four feet. That is, that the floor of the——

A. Floor level above the rail.

Q. Four feet off the rail?

A. Above the rail.

Q. And the rail was six inches?

[fol. 33] A. That's right.

Q. So that the floor of the caboose would be above the deck, or the bridge, that is, above the ties about four and a half feet?

A. That's right.

Mr. Black: Mr. Ventura, will you come forward, please.

Harold Lee Ventura, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Mr. Ventura, you may state your name and your address, please?

A. Harold Lee Ventura, 352——

The Court: Tell us the whole thing over again, slowly and distinctly.

A. Harold Lee Ventura, 352 Pickton.

Q. Grand Junction, Colorado?

A. Grand Junction, Colorado.

Q. Mr. Ventura, I want you to speak so Mr. Smith and all the jurors can hear every word you say, remember that?

A. Yes sir.

Q. How old are you, Mr. Ventura?

A. Twenty-one.

Q. You are now employed by the Rio Grande Railroad Company, are you not?

A. Yes sir.

Q. And have been since May of 1943, as I understand it?

A. Yes sir.

Q. And what is the nature of your employment, Mr. Ventura?

A. Brakeman.

Q. Brakeman?

A. Yes sir.

Q. In freight or passenger service?

A. Well, I am on extra board; I catch freight and passenger both, mostly freight.

Q. Have you been on the extra board since you were employed in May of '43?

[fol. 34] A. Yes sir.

Q. And in what division, what division do you work on?

A. Well, Grand Junction Division, from Grand Junction to Minturn to Bond.

Q. You work eastward from Grand Junction?

A. Yes sir.

Q. You are not on the division that comes from Grand Junction to Helper?

A. Well, that is on the extra board there; I catch that once in a while, too.

Q. Your main employment——

A. East end.

Q. Between Grand Junction and——

A. Yes.

Q. Have you served both as head end and rear end brakeman?

A. Yes sir.

Q. What are the general duties of rear end brakemen?

A. Well, he watches his train, flags when the train stops on the main line, keeps care of the markers and—mainly watches his train.

Q. When the train is moving, he generally rides the caboose, the rear end?

A. Yes sir.

Q. The head end brakeman looks to the head end of the train?

A. Yes sir.

Q. Usually, when the train is going along he rides up in the engine?

A. Yes.

Q. You are acquainted, are you not, with Mr. Pauly?

A. Yes.

Q. You knew Mr. Pauly, did you not, when he was conductor on the Rio Grande?

A. Yes sir.

Q. Worked with him, have you not?

A. Yes sir.

Q. Mr. Ventura, you were on the train the night he was injured, were you not?

[fol. 35] A. Yes sir.

Q. That run that you were on started at, westward from Bond, Colorado, did it not?

A. Yes sir.

Q. And do you recall about what time it was when the train pulled out of Bond?

A. No sir, I don't.

Q. And as you traveled westward you approach and pass through Glenwood Springs, do you not?

A. Yes sir.

Q. You are acquainted with those stations along there, are you not?

A. Yes sir.

Q. The first switch out of Glenwood Springs coming towards the west, is Funston, is it not?

A. Yes sir.

Q. After you leave Funston, you come into Chacra?

A. Yes sir.

Q. The road is, as it proceeds westward from Glenwood Springs toward Chacra, is travel through the mountains, is it not?

A. Yes sir.

Q. Down Waterway Canyon?

A. Glenwood Canyon.

Q. And the grade is down hill from Glenwood Springs to Chacra?

A. Yes sir.

Q. The road through there is built on various curves?

A. Yes sir.

Q. Both to the right and to the left. You are acquainted with the tracks and switch there at Chacra, are you not?

A. Yes.

Q. Especially you have noticed—you did notice them before, and have noticed them since the accident?

A. Yes sir.

Q. Will you describe for the jury the construction of the grade there at Chacra, what the grade is made out of?

[fol. 36] A. Well, coming into Chacra there is a little slope at about the middle of the main line, well, between the two blocks, you start climbing up a little, then you drop again, and there is a curve to the right.

Q. What—pardon me. What is the color of the——

Mr. Van Cott: He said "curve."

Q. As the road, the grade approaches and crosses the bridge, it turns to the left as you are going west?

A. That is right.

Q. That is right, isn't it?

A. Yes.

Q. Right-hand curve going the other way, left-hand curve as going westward?

A. Yes sir.

Q. Directing your attention to the grade itself, of what material is that grade made, through there?

A. Well, made of slag; is that what you mean?

Q. Yes; what color is it?

A. Black.

Q. That's all the way through the yards?

A. Yes sir.

Q. Mr. Ventura, at Chacra there are passing tracks, are there not?

A. Yes sir.

Q. What is it, the main line, the south or the north?

A. South.

Q. South line is the main line?

A. Yes sir.

Q. I think it has been testified here that the passing track is sixty-six hundred feet long; you would say that is about right, would you not?

A. Yes sir.

Q. Mr. Ventura, I call your attention to the night that Mr. Pauly was injured, and will ask you if you recall that occasion?

A. Well——

[fol. 37] Q. You remember when Mr. Pauly was injured, do you not?

A. Yes sir.

Q. You were on the rear end of the train as it left Glenwood Springs, moving west?

A. Yes sir.

Q. When you were in the neighborhood of Funston, you may state whether or not you were in the cupola of the caboose?

A. I was in the cupola of the caboose.

Q. And were you looking up toward the head end of the train?

A. Yes sir; looking over the train.

Q. What, if anything, did you observe, with respect to the condition of the train?

A. Well, I seen a brake sticking, about fifteen to twenty cars ahead of the caboose.

Mr. Van Cott: Could Mr. Smith hear that? Can all the jurors hear that?

Q. How did you determine, Mr. Ventura, that the brake was sticking?

A. By the sparks it made.

Q. Sparks were flying out of the wheel?

A. Yes.

Q. You think that was about fifteen, twenty cars up from the caboose?

A. Yes sir.

Q. And that indicated to you that a brake was sticking?

A. Yes sir.

Q. Where was Mr. Pauly at that time?

A. Mr. Pauly was on the other side of the cupola.

Q. On the right side?

A. Yes sir.

Q. By the way, Mr. Ventura, which side of the engine is the engineer located?

A. He is on the right side.

[fol. 38] Q. On the right side?

A. Say we was going on the right side.

Q. That would be on the north side of the train as you were moving up into Chacra?

A. Yes sir.

Q. Was it possible for you fellows in the rear end to signal the engineer at that time?

A. No sir.

Q. Could you see the engineer?

A. No sir.

Q. Where, with respect to Funston were you, when you first observed this brake sticking?

A. Well, we was just coming out of Funston.

Q. Moving west out of Funston?

A. Yes sir.

Q. What, if anything, did you do?

A. Well, I told Mr. Pauly that it looked like there was a brake sticking. He come over and he said, "Yes, it is, a brake is sticking." He says, "We will stop them up here and I will check it."

Q. And what did he do to stop, if you know.

A. He stuck out a red fusee.

Q. Where did he stick it?

A. Right on the window there, made of wood, had a little spike or something, that you can stick against the wood.

Q. This fusee you might compare to a big match, mightn't we?

A. Yes.

Q. You take the top off it, and strike like a match?

A. Yes sir.

Q. Starts to burn?

A. Yes sir.

Q. Throws off sparks?

A. Yes sir.

Q. The other end of the fusee is a spike; that's right, isn't it?

[fol. 39] A. Yes sir.

Q. So you just stuck that spike into the left side of the cupola after the fusee had been lit?

A. Yes sir.

Q. That made a red light?

A. Yes sir.

Q. At that time was the left side of the engine within the view of the men in the rear end of the train, and caboose?

A. Well, yes.

Q. Train?

A. Coming out of Funston there, it was, but he didn't stick the fusee out at Funston. I don't remember right—I think it was about South Canyon, as we looked it over, to make sure.

By Mr. Black:

Q. I show you this fusee that has been handed to me by Mr. Van Cott; that is a red fusee, is it not?

A. Yes sir.

Q. In order to light it, you break off this end, don't you?

A. Yes sir.

Q. And strike the thing like you would a match?

A. Yes sir.

Q. Then drive this spike into whatever you want to attach the fusee to?

A. Yes sir.

Q. A tie, or the side of the caboose, or whatever it is. And you saw Mr. Pauly strike—break the red fusee there just about a—and spike into the left side of the cupola of the caboose?

A. Yes sir.

Q. That made a red light?

A. Yes sir.

Q. Now, of course, that was before the train reached the west switch point at Chacra, was it not?

A. Yes sir.

Q. Did the engineer give any signal that he had been informed of the sign?

A. No sir.

[fol. 40] Q. By the way, Mr. Ventura, what were the weather conditions that night?

A. Oh, it was rather dark, and snow was just beginning to fall. It had melted about as fast as it hit the ground.

Q. Any moon of any kind?

A. No sir.

Q. This accident happened somewhere shortly before midnight, did it not?

A. Yes sir.

Q. Now, when the train pulled into Chacra, did it go on the main line, or the passing track?

A. On the main line.

Q. Went in on the south of the tracks there?

A. Yes sir.

Q. And after the rear end of the train had passed the west switch point, or I should say the east switch point, you may state whether or not the train slowed down and came to a stop?

A. Yes sir, the train slowed down and came to a stop.

Q. What was the size of the train, do you know how many cars that were on it?

A. Eighty-six cars and a caboose, eighty-seven cars.

Q. Those freight cars, from coupler to coupler are about forty-five to fifty feet in length?

A. Yes sir.

Q. That train was being handled by a Diesel engine, wasn't it?

A. Yes sir.

Q. When the train finally came to a stop, what did you do?

A. Well, the train slowed down to about a walk, and I dropped off about a car length before we got to—went back to flag, because we were stopping on a main line.

Q. In other words, you walked back towards the east?

A. Yes sir.

Q. About how dark was it at that time—what was the extent of your vision?

[fol. 41] A. Oh, really dark that night.

Q. It was really dark that night?

A. Yes sir.

Q. As you dropped back, or dropped off and proceeded back, you may state whether or not you observed any other trains there in the yard?

A. Yes, there was No. 20 passenger train coming down the pass at the time.

Q. In which direction was it moving?

A. It was going east?

Q. Going the opposite direction of your train?

A. Yes sir.

Q. Which side of the caboose did you dismount from?

A. I dismounted on the left side.

Q. That would be——

A. The south side.

Q. The south side. Have you had, as brakeman, any instructions with reference to the side from which to dismount?

A. Yes sir, its the best to mount on which side is the safest.

Q. Which would be the safest side?

A. The left side.

Q. Why?

A. Because there was a train coming down the pass, might fall, and fall right into the wheels of the train.

Q. And so you dismounted, as you say, from the left side?

A. Yes sir.

Q. By the way, on which side of the train was this sticking brake?

A. It was on the left side, south side.

Q. The same side you dismounted from?

A. Yes sir.

Q. That would be the down-hill side, would it not?

A. Yes sir.

Q. North Canyon, as I understand it flows under the [fol. 42] bridge, flowing from the north to south, toward the river there?

A. Yes sir.

Q. Now, how far back did you proceed, Mr. Ventura?

A. Oh, I walked back about three car-lengths.

Q. What, if anything, did you see, or observe, at that point?

A. Well, No. 20 was coming down the pass, looked at it.

Q. Watched No. 20 go by?

A. Yes sir.

Q. After No. 20 went by, did you notice anything in the creek?

A. Yes, I happened to look back and didn't see anybody going down the side of the train, so——

Q. Which side of the train did you look down?

A. I looked down the south side, and I seen a yellow fusee burning at the bottom of the creek, so I dropped a ten minute fusee, and I hollered, and nobody answered, and I went down there with a fusee burning, and I saw Mr. Pauly lying there.

Q. Mr. Ventura, as this freight train was slowing down, as it pulled into Chacra, did you see Mr. Pauly in the caboose?

A. You mean in the caboose?

Q. Yes, as the train was slowing down before you dismounted?

A. Yes sir, Mr. Pauly put a new battery in his lantern, tried it out, and grabbed a fusee, a yellow fusee, I don't know whether ten minutes or five minutes——

Q. Where in the caboose was Mr. Pauly at that time?

A. He was at his desk, had his grip, and he got the battery out of his grip.

Q. Where was his grip, and where was he with respect to the east or west end of the caboose?

A. At the west end of the caboose, the desk is on the north side of the caboose.

Q. On the north side, to the west end?

A. To the west end.

Q. Mr. Ventura, I want you to describe for the jury the [fol. 43] steps that led down onto the ground from the caboose, on both ends, that is, you first take the steps that lead down the ground, rear end of the caboose. Tell the jury about them and tell the jury about the steps that lead down to the ground from the front end of the caboose?

A. Well, there is about three steps and about, oh, foot and a half to two feet from the ground, and it is the same thing on the west end.

Q. You may state whether or not those steps extend out beyond the body of the caboose itself?

A. No, I don't think so.

Q. They come out flush with the edge of the body of the caboose?

A. Yes sir.

Q. Now, you have told the jury, Mr. Ventura, when you saw the yellow fusee burning in the creek bed, you went down, found Mr. Pauly?

A. Yes sir.

Q. What did you observe with reference to his condition at that time?

A. I asked him how he felt. He said he couldn't move his legs, and he was laying on his left side, and so I asked him if he was cold, and he said, "No", and I asked him if he wanted me to get my coat. He said, Yes, get it and put it behind his back. So then I told him I would tell the head end. He said, "Yes, go up and tell the head end." So I went to the head end, and met Brakeman Arvis.

Q. Was he up in the Diesel?

A. Yes; he was walking back at that time.

Q. Which side of the train did you walk westward on?

A. I walked on the north side, in between the main line and the pass.

Q. And did you meet Arvis before you reached head end of the train, as I understand?

A. Yes.

Q. About how many car lengths did you have to walk before you met him?

[fol. 44] A. Oh, about twenty- *twenty*-five cars.

Q. No trains passed while you were making that trip?

A. No sir.

Q. And, of course, I understand that you and Mr. Arvis then returned to Mr. Pauly?

A. No, Mr. Arvis went back to the head end and I come back to Mr. Pauly, and he told me to call Funston, tell them what happened, so I went up there and called Funston and asked them to flag for us, send out an ambulance, to flag for us and send out an ambulance.

Q. Then what happened, go right ahead and tell the jury.

A. Then come back, went up and got some ten minute yellow fusees, so I could make some light down there, and then a 3600, when I was coming back to Mr. Pauly from the phone, and the 3600 went past, and when I was down underneath the bridge, a Diesel went past. Then our Diesel engine came back and they all come down, and the fireman and I went over to the highway to look for the ambulance. We came back, I guess, about forty-five minutes to an hour, the ambulance came, got Mr. Pauly, took him away.

Q. When was Mr. Pauly taken from the creek bed?

A. When the ambulance came.

Q. He stayed there until the ambulance came?

A. Yes sir.

Q. During the time that you were in the presence of Mr. Pauly, did he make any manifestations of pain or suffering, of any kind?

A. Yes sir, when we put him on the wheel chair, I mean on the stretcher, he was pretty much in pain, he really groaned. Then they had some pillows, and they had to take them all out for him; he couldn't stand them.

Q. Couldn't stand it?

A. Yes sir.

Q. I see. And you didn't see Mr. Pauley after that?

A. No sir.

Q. Now, Mr. Ventura, did you see the, notice the caboose standing on the bridge at that time?

A. Yes sir, when I went back up after the fusee, the rear [fol. 45] end of the caboose, east end, was about three feet on the bridge.

Q. That would be the west end?

A. No, that would be the east end, because the west end was all the way on.

Q. The east end of the caboose was about three feet on the bridge?

A. Yes sir.

Q. That caboose, you say, is about forty-five, fifty feet in length from the coupler to coupler?

A. Yes sir.

Q. Did you notice whether or not the side of the caboose came out flush with the end of the ties with it?

A. No sir, it never.

Q. Tell us about that?

A. Well, it was just right even with the ties.

Q. That is what I say, the outside, the side outside of the caboose was about flush with the end of the ties?

A. Yes sir.

Q. And so the steps on the west end of the caboose, on the north side, on the south side, would be right out also, flush with the end of the ties?

A. Yes sir.

Q. Where, with reference to the steps on the south and west corners of the caboose was Mr. Pauly, having in mind, Mr. Ventura, the steps.

A. Yes sir.

Q. On the west and south side of the caboose, you may state whether or not Mr. Pauly was below those steps?

A. Yes, he was right below the west step.

Q. Right down there at the——

A. To the bed of the creek, where he stepped off.

Q. Did you notice the bed of the creek at that time, as to whether or not there were any rocks and boulders there?

A. Well, five feet to the left of us was rocks and boulders, where Mr. Pauly fell, it was just flat.

[fol. 46] Q. Mr. Ventura, I want to ask you whether or not there were any walks or hand-rails on that bridge at that time?

A. No sir.

Q. The ends of the ties was the outside structure of the bridge, was it not?

A. Yes sir.

Q. Mr. Ventura, were there any lights on that bridge, of any kind?

A. No sir.

Q. What is that?

A. No sir.

Q. Were there any markers on the bridge, of any kind?

A. No sir.

Q. Were there any lights in the vicinity of the bridge, or near the bridge?

A. No sir, just the signal lights.

Q. And where are the signal lights?

A. They are at the east end, about thirteen carlengths from the bridge.

Q. That would be back towards?——

A. Funston.

Q. Funston. And what are the nature of those lights?

A. Well, they are green and red and yellow.

Q. Well, they are just to indicate the position of the switch, aren't they?

A. Yes sir.

Q. They don't give any illumination to any particular part of the right-of-way?

A. No sir.

Q. There are no lights between the switch points and the bridge?

A. No sir.

Q. Are there any lights between the bridge and the west switch point?

A. No sir.

Q. Where is the telephone booth at Chacra?

A. At the east end, and to the west end, right there at the [fol. 47] signals.

Q. There is a telephone booth there at the——

A. Signals.

Q. To the east and the west. Mr. Ventura, during the time you have worked for the Rio Grande, you may state whether or not it's common practice for trains to stop and trains to pass one another at Chacra?

A. Yes sir.

Q. And has that passing track been in constant use for what purpose during all the time you have worked there?

A. Yes sir.

Q. Mr. Ventura, under what circumstances are trains stopped at Chacra?

A. What are they stopped for?

Q. Yes.

A. Well, if another train was coming to the passing track, they will make you wait there until he gets in the clear, then let you go; if there is trouble with the train there, they see a red fusee back there, they should stop.

Q. Stop on passing track in order to make an investigation?

A. Yes sir.

Q. How is the traffic, the train traffic, handled on the road there between Glenwood Springs and Grand Junction?

A. C. T. C., centralized traffic control.

Q. All right, tell the jury what centralized traffic control is?

A. Centralized traffic control, it is man—one man operates the whole, the switches and turn-outs, he lets you in the passing track and lets you out the passing track with your train. You don't have to throw the switches, it is automatic. He has got a board up there and he can follow the train by little spots on this board, and he can let you in and out the passing track himself. You don't have to get off the engine, turn the switch.

Q. And, Mr. Ventura, when a train comes up against [fol. 48] the signal there at the west switch point at Chacra, and it is clear, why then, of course, you can move right on, pass the switch point and continue on the main line?

A. Yes sir.

Mr. Black: That's all. You may cross-examine.

Cross-examination.

By Mr. Van Cott:

Q. Mr. Ventura, you were asked about whether there were any lights on this bridge, and you answered that there were not. Are there ever any lights on any bridge?

A. No sir.

Q. Counsel also asked you whether there were any lights between the bridge and the east and west switch points, and you answered that there were not; do they ever have lights along any passing track?

A. No sir.

Q. It is always left to the trainmen to see conditions, by the use of their lanterns; isn't that correct?

A. Yes sir.

Q. The railroads furnish batteries and globes for electric hand lanterns that are carried by all trainmen; isn't that correct?

A. Yes.

Q. And the trainmen can either have their own lantern in which they put those batteries and lights, or they can use one furnished by the railroad, as they choose?

A. Yes sir.

By Mr. Van Cott:

Q. The lanterns that the trainmen use, are used to illuminate the conditions around them as they work, isn't that correct, Mr. Ventura?

A. Yes sir.

Q. And they have a light globe in the bottom of the lantern, do they not?

[fol. 49] A. Yes sir.

Q. So that the light from the lantern, as you hang it on your arm, or as you carry it in your hand, will shine on the ground or whatever the surface is, isn't that right?

A. Yes sir.

Q. Do you know what kind of a lamp Mr. Pauly had?

A. No sir.

Q. But you say that as your train was approaching Chacra, you saw him put a new battery into it?

A. Yes sir.

Q. Did you see him turn on the light?

A. Yes, I seen him turn it, try it out.

Q. And did the light shine from the lantern?

A. Yes sir.

Q. And did he leave that light on, or turn it off?

A. I don't remember, Mr. Van Cott.

Q. Now, as you went forward after the accident, after you had been down in the creek bed and found Mr. Pauly, as you went toward the head end of the train, as you say you did do, how did you cross this stream bed?

A. I never crossed the stream bed, I come back up.

Q. Came up, and how did you get across the stream, then?

A. Oh, I went across the tracks and back to the caboose.

Q. Back to the caboose; then you started up for the head end of the train, didn't you?

A. Yes.

Q. What did you walk on, to get across the stream?

A. There was a platform, wood platform.

Q. There is a wood platform built between the two tracks all the length of the bridge, isn't there?

A. Yes sir.

Q. And that is what you walked on?

A. Yes sir.

Q. That platform is about how wide, would you say?

A. About seventy-five feet.

[fol. 50] Q. Well, I mean—that's the length of it, but I mean between the rails.

A. How wide—oh, about ten feet.

Q. At any rate, it comes right up to the rails, doesn't it?

A. Yes sir.

Q. And that's the only bridge that is provided across, across that creek, isn't it?

A. Yes sir.

Q. You walked forward how many car lengths, would you say, before you came to where the head brakemen met you?

A. Oh, twenty to twenty-five cars.

Q. Twenty or twenty-five cars?

A. Yes sir.

Q. Have you stated how long a car is, I don't remember whether you asked him.

A. Forty-five to fifty feet.

Q. Oh yes, forty-five to fifty feet.

A. Yes sir.

Q. On the way towards the head end, where you met the head brakeman, did you notice the sticking brake?

A. No sir.

Q. You were intent upon getting word up to the head end that Mr. Pauly had been injured, I take it?

A. Yes sir.

Q. After you met the head brakeman and gave him the word, and started back, did you find the sticking brake?

A. Yes sir.

Q. And about how many cars ahead of the caboose was it?

A. About fifteen or twenty cars, I don't remember.

Q. How were you able to detect——

A. By smoke from the wheels.

Q. By smoke from what?

A. The wheels.

Q. The wheels?

A. Yes sir.

[fol. 51] Q. How were you able to see the smoke?

A. With my lantern.

Q. With your lantern?

A. Yes sir.

Q. How far away from the smoke did you see it with the lantern; how far away from it were you when you saw it?

A. I was, oh, about a couple of feet.

Q. A couple of feet from it?

A. Yes sir.

Q. Did you have a spot light on your lantern, or just a spray light?

A. I don't remember.

Q. You don't remember?

A. I was looking at the wheels.

Mr. Black: At the what?

A. I was looking at the wheels, going back.

Q. The wheel on which you found the sticking brake was on the north side of the train, wasn't it?

A. Yes sir.

Q. On the engineer's side?

A. Yes sir.

Q. On the same side of the train that the bridge across this creek was on?

A. Yes sir.

Q. Now, you have testified, Mr. Ventura, that when you first saw the fire flying from that wheel, I think you said you saw it on the south side of the train?

A. Yes sir.

Q. Or left-hand side?

A. Yes sir.

Q. And state the appearance of the fire that you saw?

A. Well, it was, sparks were going around the wheels, then every once in a while it would give a blue streak slide.

Q. So that you saw a blue circle of flame at those times; is that right?

A. No, the blue circle of flame, when it was sliding, see, [fol. 52] would skip along, see, would grab, then the wheels would slide.

Q. Were you able to determine, from the appearance of that fire, that you had a sticking brake?

A. Yes sir.

Q. It wasn't a hot box, it was a sticking brake; is that right?

A. Yes sir.

Q. Was it that circular fire——

A. Yes sir.

Q. That enabled you to reach that conclusion?

A. Yes sir.

Q. About how bright would you say that fire was that you saw?

A. Oh, its bright as a lantern, a fusee.

Q. Bright as a fusee; you refer to a red fusee or a yellow fusee?

A. Yellow fusee.

Q. A red fusee makes a red light, I take it?

A. Yes sir.

Q. A yellow fusee a yellow light?

A. Yes sir.

Q. You say that this, the illumination from this wheel was about as bright as a yellow fusee?

A. Or a lantern.

Q. And you were able to see that when your train was moving, although it was fifteen or twenty cars away?

A. Yes sir.

Q. Could you have seen it if it had been fifty cars away?

A. Yes sir, possibly.

Q. A hundred?

A. I don't know, I haven't ever been on a hundred car train.

Q. As long a train as you have ever been on, you could have seen that fire between the brake and the wheel; is that correct?

A. Yes sir.

Q. That would have been true that night?

A. Yes sir.

Q. It was distinctly visible, was it?

A. Yes sir.

[fol. 53] Q. How do you account, Mr. Ventura, for the fact that you saw fire first on the south side of the train when you were up in the cupola of the caboose, and then when you were coming back from meeting the head brakeman, you detected the trucks on which the brakes were sticking on the opposite side of the train, that is the engineer's side, or north side? How do you account for that?

A. Well, the brakes must have been sticking on all wheels.

Q. Is that always——

A. Both sides, on both sides, rather.

Q. What?

A. The brakes must have been sticking on both sides.

Q. Is that the way it always is?

A. Well, most of the time.

Q. All of the brakes on a truck, on a single truck of a freight car, are controlled by the same levers, are they not?

A. Yes sir.

Q. And by the same brake cylinder, is that correct?

A. Yes sir.

Q. So now—on a single freight car you have two trucks, don't you?

A. Yes sir.

Q. And each truck has four wheels?

A. Yes sir.

Q. And if the brake is sticking on one wheel of one truck, then you will find that all four brakes are sticking on that truck; is that correct?

A. Yes sir.

Q. So that, so far as finding the brake that is sticking, it doesn't make any difference whether you go up on one side or the other?

A. One side might be hotter than the other because they might have a new brake shoe on the one side and an old one on the other.

Q. You wouldn't know which side was going to be hotter until you got to the truck?

A. Yes sir.

[fol. 54] Q. You would be able to detect the truck that had the sticking brake from either side of the car, wouldn't you?

A. Yes sir.

Q. And you did on that night?

A. Yes sir.

Q. I think you testified that as you went west towards the head end of the train, that no trains passed you on the passing track?

A. No sir.

Q. That is up to the time you met Mr. — or the head brakeman?

A. Yes sir.

Q. If any train had passed you, you had plenty of clearance between the two trains, didn't you?

A. Yes sir.

Q. Your train was on the main line and any train that was going to pass you would have to be on the passing track, wouldn't it?

A. Yes sir.

Q. And it would have to be going at the restricted speed?

A. Yes sir.

Q. That is eight miles an hour, or ten miles an hour?

A. Eight to ten miles an hour.

Q. So that there wouldn't be any danger to you, or any other trainman being between those trains, with the moving train on the passing track; is that correct?

A. Yes sir.

Q. You had clearance there between the two trains on that, on those two tracks, you would have a clearance of seven or eight feet, would you not?

A. Yes sir.

Q. You testified that when you observed the east end of the caboose, that it was about three feet on to the bridge?

A. Yes sir.

Q. So, as I understand you, when you made the observation, the east end of the caboose was just about three feet onto the east end of the bridge; is that correct?

[fol. 55] A. Yes sir.

Q. And did you observe the distance from the lower step of the east end of the caboose to the ground below it?

A. About three, about four foot.

Q. So that if a man had stepped off the east end of that caboose, at the position it was when the train stopped, he would have stepped down a distance of, did you say three or four, or four?

A. Four to five feet, I will say that.

Q. Four to five feet?

A. Yes sir.

Q. I think, when your deposition was taken by Mr. Black, you said three or four feet, did you not, Mr. Ventura?

A. Yes sir.

Q. Has your recollection of that changed?

A. I'd say three or four feet.

Q. Three or four feet. That train didn't move from the time that it came to a stop upon reaching the Chacra siding, until after the accident, did it?

A. No sir.

Q. It came to a stop—after you dropped off the caboose, the train came to a stop, and it remained in exactly that same position from that time until after you had brought the Diesel back, got Mr. Pauly out of the creek bed and put him in the ambulance, isn't that correct?

A. Yes sir.

Q. After the train had been brought to a stop by that red fusee that you say Mr. Pauly stuck into the side of the cupola, no one would move that train until after receiving signal from the rear end; is that correct?

A. Correct.

Q. And on the rear end there were only you and Mr. Pauly?

A. Yes sir.

Q. And you wouldn't give any signal to move the train until you knew that Mr. Pauly was free of the equipment; is that correct?

A. Yes sir.

[fol. 56] Q. When you got down in the creek bed, what did Mr. Pauly say to you?

A. He says, "I thought we was past the darn bridge."

Q. Had you asked him that question?

A. I asked him how he fell.

Q. How he happened to fall?

A. How he fell down.

Q. His answer was, "I thought I was past the darn bridge"?

A. I didn't—I thought you meant I asked him the question after that.

Q. You didn't ask him the question that brought out that answer, "I thought I was past the darn bridge"?

Q. Is that what he said, "I thought we were past the darn bridge"?

A. Yes sir.

Q. Or did he say, "I thought I was past the darn bridge"?

A. "I thought we was past the darn bridge."

Q. Now, you testified that you dropped off that caboose when it was moving about the same speed that you can walk. I think you said, did you not?

A. Yes sir.

Q. What do you say that was, how many miles an hour, three or four miles an hour?

A. Yes.

Q. Did you have your lantern?

A. Yes sir.

Q. How were you holding it just before you dropped off?

A. Well, I was holding the handle of the lantern.

Q. Pardon me.

A. The handle of the lantern.

Q. The handle of the lantern?

A. Was holding it over my hand like this, and I was grabbing hold onto the caboose, and I had a red lantern in this hand, white lantern in the left hand.

Q. You were holding onto the hand-holds at the rear steps of the caboose?

[fol. 57] A. Yes sir.

Q. On the south side. You had your—you were holding on with your left hand to the forward hand-hold, and with your right hand at the rear hand-hold; is that correct?

A. Yes sir.

Q. You had your electric white lantern in your left hand?

A. Yes sir.

Q. And a red lantern in your right hand; is that correct?

A. Yes sir.

Q. And before you stepped down from that caboose, you looked down, did you?

A. Yes sir, for a second.

Q. You looked down at the ground before you stepped off?

A. Yes sir.

Q. And the lantern that you held in that hand illuminated the ground upon which you were going to step, did it?

A. Yes sir.

Q. You saw what you were going to step onto was solid ground, did you?

A. Yes sir.

By Mr. Van Cott:

Q. You testified, Mr. Ventura, that the roadbed along there was "slag", did you call it?

A. Slag.

Q. Slag. And that is black, is it?

A. Yes sir.

Q. But you were able to see it with your lantern, all right, weren't you?

A. See the ground?

Q. Pardon me?

A. See the ground?

Q. And the slag on the ground?

A. Yes sir.

Q. Now, as you walked—I think you testified you walked back from the position where you dropped off the caboose, you walked back towards the east three or four car lengths, did you say?

[fol. 58] A. Yes sir.

Q. Were you using your lantern to illuminate your way?

A. Yes sir.

Q. You could see your way all along there, could you?

A. Yes sir.

Q. When you got back there three or four car lengths, I think you testified that you looked toward the west—toward the caboose of your train, looking to see where Pauly was, I believe.

A. Yes sir.

Q. Did you so testify?

A. Yes sir.

Q. And did you see the light of the caboose?

A. Yes sir.

Q. What light was there in the caboose?

A. The desk lamp.

Q. What kind of lamp was that?

A. Well, kerosene.

Q. Kerosene; ordinary kerosene light?

A. Yes sir.

Q. Is that the only light in the caboose?

A. Yes sir.

Q. And you were able to see that when you were three or four car lengths away from it?

A. Yes sir.

Q. You looked for Pauly?

A. No, I looked for his light.

Q. You looked for his light. You looked on both sides of the train?

A. No sir, just the, just on the south side.

Q. When you didn't see him on the south side, did you look on the north side?

A. No sir; I seen the fusee burning down——

Q. You saw the fusee burning; that is why you didn't look any further?

A. Yes.

[fol. 59] Q. When you dropped off the caboose, I think you testified that Train No. 20 was either passing you, or about to pass you, or had passed you; at any rate, it was in your vicinity?

A. Yes sir.

Q. Where did you say it was with reference to you at the time you dropped off the caboose?

A. Well, the engine was about to the caboose.

Q. The engine of No. 20 was about to the caboose?

A. That's right.

Q. That means, then, as I understand you, that No. 20 was going east, the opposite direction that you were going, and it was on the passing track?

A. Yes sir.

Q. Is that correct? Answer audibly?

A. Yes sir.

Q. And the engine was about opposite the caboose at the time you dropped off; is that correct?

A. Yes sir.

Q. And the caboose was just going on the bridge?

A. Yes sir.

Q. Could you see it going on the bridge?

A. No, I didn't pay any attention.

Q. You knew the bridge was there, though?

A. No sir, I didn't.

Q. Now, No. 20 is a passenger train, is it not?

A. Yes sir.

Q. And what does it consist of?

A. Well, there is a baggage car, mail car, a coach, and a Pullman.

Q. So it has got an engine and——

A. And an engine.

Q. And a tender, and a baggage car, mail car, day coach and sleeper?

A. Yes sir.

Q. Did you notice the number of the engine?

[fol. 60] A. No sir.

Q. As it passed you were you walking east on—were you watching the train?

A. I was walking east.

Q. Walking east?

A. Yes sir.

Q. Were you able to see the equipment?

A. Yes, I stopped and watched it go past.

Q. Did you shine your—the light from your lantern onto the numbers of the cars as they went by?

A. No sir.

Q. When did you first reach the conclusion as to the engine that was on that train?

A. Well, by when it come past me, when I was standing there, when it came past me, just tell by looking at it, 800.

Q. You could tell, by looking at the engine, that it was an 800 engine; is that correct?

A. Yes sir.

Q. After you put the red fusee out, or, I mean, after Mr. Pauly put the red fusee out on the side of the cupola, did you see any answering light from the head end?

A. He didn't put the red fusee out, it burned out itself.

Q. You didn't understand me. After you first placed the burning red fusee, did you see an answering signal light from the head end of the train?

A. On coming into Chacra there, we usually give a high-ball, there is a big curve, and we can see the brakeman around that curve—we can see the head end of the train around that curve, and I thought I seen the head brakeman give a flicker with his light; I might be mistaken.

Q. That is what you think, though, is that correct?

A. Yes sir.

Q. That is according to your best recollection?

A. Yes sir.

Q. And that would be a natural signal for you to see under those circumstances, wouldn't it?

[fol. 61] A. Well, not necessarily; they don't have to answer you back.

Q. They don't have to, but they frequently do; is that correct?

A. Yes sir.

Q. Your answer was "Yes"?

A. Yes sir.

Q. When they do it, they do it with the same kind of an electric lantern you described you were carrying yourself that night?

A. Yes sir.

Q. That light would be eighty-six car lengths, plus the length of the Diesel engine, away from you when you saw it?

A. Yes sir.

Q. I think you testified that when you were down in the creek bed, that you looked up and saw the caboose, and described the position of Mr. Pauly's body with reference to the west steps of the caboose; is that correct?

A. Yes sir.

Q. And you did see the caboose from down in the creek bed, did you?

A. Yes sir.

Q. Could you see the—could you see it distinctly enough so that you could see it was the front steps, the west steps of the caboose you were looking at?

A. Yes.

Q. I take it the reason you were able to know they were the west steps, that you also looked towards the east and saw the east steps; is that correct?

A. Yes sir; I had yellow fusees burning down there.

Q. By those yellow fusees you could see the caboose and the position of the caboose with reference to the cars?

A. Yes sir.

Q. And you could see the position of everything around you down there in the creek bed, couldn't you?

A. I wouldn't say that.

[fol. 62] Q. How big a circle was illuminated by the yellow fusee you had down there in the creek bed?

A. I don't know.

Q. Fifty feet?

A. No.

Q. You were able to look up and see the steps of the caboose, and the rear end of the caboose, and also the top of the caboose, were you not?

A. Yes sir.

Q. That would be about fifty feet, wouldn't it?

A. No, be about twenty-five to thirty feet.

Q. Twenty-five or thirty feet you could see clearly?

A. Yes sir.

Q. With the light of that yellow fusee; is that correct?

A. Yes sir.

Q. That is the same kind of a fusee you saw Mr. Pauly pick up when you last saw him moving towards the west end of the caboose; is that right?

A. Yes sir.

Mr. Van Cott: That is all.

Redirect examination.

By Mr. Black:

Q. Mr. Ventura, these lanterns that you boys have, you use at night to give signals with, don't you?

A. Yes sir.

Q. That is why you have them, isn't it?

A. Yes sir.

Q. You are still working for the Rio Grande, aren't you?
A. Yes sir.

By Mr. Black:

Q. I want you to describe rather fully to the jury these brakemen's lanterns you were talking about to Mr. Van Cott.

A. Well, they have a handle, a body, it has a cap on it that you stick your batteries in in the body, then it has a place for two globes. Mine has a spot and a spray, then it has, oh, wire rim around it.

[fol. 63] Q. Will you tell the jury the differences in the spot and the spray?

A. Well, the spray throws out a flare, see, and the spot—well, for spotting numbers on the car.

Q. A spot throws out a concentrated light in a smaller area?

A. Yes sir.

Q. Like if you want to see a number on a train or a car or something of that kind, and the spray is just the ordinary light like ordinary lantern has; is that right?

A. Yes.

Q. The only way you boys can pass signals at night is with a lantern, isn't it?

A. Yes sir.

Q. When you said that you thought you could see a lantern on the head end of the train, eighty-six cars away, you didn't mean to intimate any illumination from a light would carry any such distance. All you could do was just see a light?

A. Yes sir.

Q. Mr. Van Cott asked you whether or not the interior of the caboose was lighted, and it was lighted all the time as you were coming out of Glenwood Springs toward Chacra, wasn't it?

A. Yes sir.

Q. You may state whether or not, when you first leave a lighted room, and come out into the darkness, whether you can see as well as when you have been out in the darkness for a while?

Now, you stated to Mr. Van Cott, in cross-examination, that when you dismounted from the caboose of this train, you could see the ground beneath your feet, with the lantern?

A. Yes sir.

Q. Was it necessary for you to have a lantern to see the ground beneath your feet?

A. Yes sir.

Q. Couldn't see the ground down without a lantern, could you?

A. No, sir.

Q. You spoke of these sticking brakes, in cross-examination. I think you stated on each of these trucks there are four wheels; that would be two on each side, and that the [fol. 64] brakes on the four wheels are handled by the same mechanism, the same lever; that is true?

A. Yes sir.

Q. Will you describe to the jury the brake-shoe?

A. Well, brake-shoe—I don't know what it is made of.

Q. It is made of metal, isn't it?

A. Some kind of metal, and it is about a foot, foot long and built on a curve, shape of the wheel, then it has two little holes there when you drop the pins in to hold onto the brake beam. That's about it.

Q. And these shoes are removed and replaced from time to time, when the car is on the rip track?

A. Yes sir.

Q. Now, you may state whether or not the, in the course of use these brake shoes get thin?

A. Yes sir.

Q. And I believe you stated, on cross-examination, that sometimes a new shoe would stick when an old shoe wouldn't, is that true?

A. No, a new shoe would stick more.

Q. That is what I say, a new shoe would stick when an old shoe wouldn't; maybe I have got it backwards in my question—is that true?

A. Yes sir.

Q. That is because the new shoe is thicker, isn't it?

A. Thicker, yes sir.

Q. When that brake mechanism sets that shoe back against the wheel, if the shoe was thicker than another, it would throw a spark where the others wouldn't?

Is that a fact, Mr. Ventura?

A. Yes sir.

Q. Mr. Ventura, you may state whether or not, from your experience, when you see at night time sparks flying out

from a sticking brake, on one side of the train, is it always a fact that sparks fly out on the other side of the train?

A. Well, sure.

[fol. 65] Q. I beg pardon?

A. They could fly out on the other wide of the train.

Q. Yes, but do they always fly out on the other side?

A. I couldn't answer that question.

Q. Have you ever seen an occasion where you saw sparks and fire come out from the other side of the train when there were no sparks and fire coming out from the other?

A. No.

By Mr. Black:

Q. Well, Mr. Ventura, from that cupola you can take positions and see both sides of the train, can't you?

A. Yes sir.

Q. I mean from the conductor's seat, you can look down along the train, see the other——

A. Cross over.

Q. From the rear end brakeman's seat, sitting down, you can see the other side?

A. Yes, if you cross over.

Q. From that cupola, you have a vision of both sides of the train. My question is, from your experience, do you know of any occasion where sparks and fire was coming from one side of the train, and fire and sparks were not coming from the other side of the train?

A. No sir.

Q. Well, have you ever seen an occasion where sparks and fire came from both sides of the train?

A. No sir.

Q. Do you know whether or not there was any sparks and fire coming from the north side——

A. No sir.

Q. (Continuing)—of this Ute 27, when you were pulling into Chacra that night?

A. No sir.

Q. The only sparks you saw were on the south side?

A. Yes sir.

Q. The only fire. Now, as you were walking west, toward the head end to make a report to the engineer and [fol. 66] the head end brakeman of Mr. Pauly's condition, you didn't make any observation with reference to this sticking brake?

A. No sir.

Q. But, as you were coming back, you were looking for this sticking brake?

A. Yes sir.

Q. Did you smell the fire before you saw it, before you saw the smoke, I should say?

A. About the same time.

Q. Well now, that odor and that smoke could have come from the south side, could it not—come under the train; come under the train from the south side?

A. Yes sir, the smoke could have.

Q. Certainly. Do you know whether or not there were any brakes sticking on the north side of that car?

A. No sir.

Q. Do you know the condition of any of the brake-shoes on the truck of the car where the brake was sticking?

A. No sir.

Q. The observation you made was with reference to smoke and odor, and that is all?

A. Yes sir.

Q. You don't know where it came from, do you?

A. I know where the smoke come from; it was coming from the north side wheels.

Q. How do you know?

A. I seen them.

Q. They were smoking, too?

A. Yes sir.

Q. Do you know whether the wheels were smoking on the south side?

A. No sir.

Q. Didn't cross over?

A. No sir.

Q. Mr. Ventura, you said something about switch clearance, as you walked westward between those tracks, what [fol. 67] would you say the overhanging of the ordinary freight car is?

A. Well, about a foot and a half, two feet.

Q. Mr. Ventura, would you say that five and a half to six feet of space within which to walk while a train was passing was safe space?

A. Well, it all depends, if you was in the passing track, and the train was coming down the main line, wouldn't be safe, but being in the, being on the main line train coming

down the pass, we will have a chance because the train is going at restricted speed.

By Mr. Black:

Q. Now, Mr. Ventura, if, while you were walking west toward the head end of your train that night, another train had been passing on the passing track, what kind of care would you have exercised to avoid an injury?

A. Well, I would have got about as close to our train as I could, probably got in between, stood there until the train went past?

Q. Now, Mr. Ventura, you spoke with reference to recognizing Engine 800, as it went east, right shortly after the time you dismounted from the rear end of the Ute 27, you said you could tell it was an 800?

A. Yes sir.

Q. There were lights in front of that engine, were there not?

A. Yes sir, there was ahead, lighting the numbers of the engine.

Q. And those numbers were illuminated, weren't they.

A. Yes sir.

Q. There was, were lights in the cabin of the engine?

A. Yes sir.

Q. Lights in the firebox, underneath the firebox, that was showing, was it not?

A. Well, the lights from the fire.

Q. Yes, see that. Any lights in those cars as they went past, those passenger cars?

A. I guess there would be a dim light in the coach, being that late, light in the mail car.

Q. Now, Mr. Ventura, while that caboose was, the Ute 27, [fol. 68] that you were on, was standing on the bridge, the lights within the caboose were burning, weren't they?

A. Yes sir.

Q. When you were down that creek bed, you could look up and see the lights in the caboose, couldn't you?

A. Yes sir.

Q. And the lights were up there——

A. Yes sir.

Q. You might state whether or not any lights were put out there in the vicinity of Mr. Pauly after he was injured?

A. No sir.

Q. Did you light up that area; I thought you mentioned fusees?

A. Oh yes, I put some ten minute fusees down there so——

Q. And they lit that neighborhood up?

A. Yes sir.

Q. Could you describe the light that a fusee makes, to the jury?

A. Oh, little darker color than them lights up there.

Q. What do you use yellow fusees for in railroading?

A. Well, we put out a yellow fusee, if you have a brake sticking you put out a yellow fusee, so the engineer, fireman sees it, he tells the engineer, and he will give the air, release the air a little more, and might kick off the sticking brake.

Mr. Van Cott: Mr. Black, so the record may be complete, the witness testified that the light from a yellow fusee would be a little darker than one of these lights in the court room. Can we identify the lights of the, these lights here, so the record will be complete in that particular. I don't know how many watts they are?

The Court: Well, would that be of any assistance when they are covered with this chandelier, the glow on the outside. I think I can tell you what the wattage is.

Mr. Van Cott: I assume the witness was speaking about the lights as they shine here in the court room.

The Court: Yes, but how can you put that in the record. We can state how many watts. Before this case is closed, we will find out from the custodian.

[fol. 69] By Mr. Black:

Q. All right. Now, you were completing your answer with reference to the use of these yellow fusees; they are warning lights, aren't they?

A. Yes sir.

Q. Ordinarily thrown out of the train, or stuck up in the ties as the train moves by?

A. Yes sir, let them know the train you are in is ahead.

Q. Used in——

A. To proceed at restricted speed.

Q. Used at yard movements and fog, to signal with?

A. Yes sir.

Q. Other uses of that kind. Lighting one of these fusees, either red or yellow, kind of spits and jumps and throw sparks, do they not?

A. Yes sir.

Q. They don't throw a general uniform light, do they?

A. Well, it's—when you start them out they spit, and then after they get to burning a little while they calm down.

Q. Then——

A. Yes sir.

The Court: Go ahead. What else?

A. I say, they spit and flicker at first, when you first strike them, then, after they burn a little while, they calm down.

Q. And you have two usual kinds, the ten minute fusee and five minute fusee?

A. Yes sir.

Q. That just means a ten minute fusee will burn twice as long as a five minute fusee?

A. Yes sir.

Q. The yellow fusee is a warning light. The red fusee is a danger light, is it not?

A. Yes sir.

Q. Don't use these fusees to light up territory or parts and places where you have to work, do you?

A. No sir.

Recross-examination.

By Mr. Van Cott:

[fol. 70] Q. Mr. Ventura, you made some mention of getting in between cars when another train was passing on the passing track, do you mean by that that there is a space between each two cars in your train?

A. Yes sir, that is where they couple on.

Q. If there is any reason to get more clearance than you have already got between the tracks, why you can step in between those spaces, between the cars of your own train; is that right?

A. Yes sir.

Q. So that, in that way you have sort of a safety zone every forty feet?

A. Yes sir.

Q. Providing you know that your own train isn't going to move?

A. Yes sir.

Q. And you did know that your own train was not going to move, didn't you?

A. Yes sir.

Q. Now, that would be in the event that a train was coming down the passing track fast enough so that you needed more space or more security?

A. Yes sir.

Q. That wouldn't be true with a train coming down the passing track at eight or ten miles an hour, would it?

A. No sir.

Q. And that is the—I think you said the restricted speed limit on that passing track?

A. Yes sir, it is in the restricted speed.

Q. I think you testified that you did determine that the brake on the north side of that truck was sticking, and will you tell the jury how you determined that?

A. Well, by the smoke from the wheels. I was walking back and had my lantern in my hand, my right hand, just walking back, checking the wheels, and smoke was coming from the wheels.

Q. You could see that the smoke came from the north wheels, could you?

A. Yes sir.

[fol. 71] Q. That was on the side away from the side that Mr. Pauly went down on; is that correct?

A. Yes sir.

Q. Now, counsel asked you about a brake-shoe wearing thin, and being replaced by a new brake-shoe?

A. Yes sir.

Q. Now, if that happened, then you would have, you might have one brake shoe that would be thicker than the other three brake shoes?

A. Yes sir.

Q. But the brake-shoes are on brake beams, aren't they?

A. Yes sir.

Q. And those brake-beams are hung so that they are connected with levers, and they equalize each other, do they not, Mr. Ventura?

A. Yes sir.

Q. You didn't mean the jury to understand that when you put a new brake-shoe on there, on a truck, that that is

the only brake shoe out of four that bear on the wheels; you didn't mean that, did you?

A. No sir.

Q. Now, counsel asked you about the caboose light, and about lights from this passing—in the passenger train. You have testified that when you stepped down from the caboose, when your train was still moving, that you saw the ground from the light of the lantern that you had in your hand; you did say that?

A. Yes sir.

Q. You remember that. And that was the only light that was illuminating the ground underneath you; is that correct?

A. Yes sir.

Q. The caboose light wasn't helping you at that time, was it?

A. No sir.

Q. Now, was there any light from the passing train?

A. No, sir.

Mr. Van Cott: That is all.

[fol. 72] Further redirect examination.

By Mr. Black:

Q. Mr. Ventura, did you mean to tell the jury that when one brake sticks on a set of trucks, and throws sparks, does that mean that all four brakes, or four brake shoes stick and throw sparks also?

A. No sir; maybe one wheel could be throwing all the sparks.

Mr. Black: That is all.

Further recross-examination.

By Mr. Van Cott:

Q. It usually means that all of them are sticking, doesn't it, Mr. Ventura?

A. Yes sir, you will find most of them sticking, be all of them sticking, but maybe the one wheel is throwing the sparks.

Q. But you would be able to detect the truck from either side, wouldn't you, whether the sparks were flying from both sides or not; is that correct?

A. Yes sir.

Mr. Van Cott: That is all.

W. T. LINKINS, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. You may state your name, Mr. Linkins?

A. W. T. Linkins.

Q. You reside at Grand Junction, Colorado, do you not?

A. Grand Junction, Colorado.

Q. You are employed by the Rio Grande?

A. Yes sir.

Q. Have been for many years, have you not?

A. Well, about twenty-seven.

Q. You are in the engineering service, are you not?

A. Yes sir.

Q. How long have you been an engineer?

[fol. 73] A. Well, I was promoted in 1921.

Q. And when did you make a regular turn?

A. Well, you mean, what do you mean, when I went to regular running?

A. Yes sir.

A. Well, I have been running engineer's regular now for about the last five years, and before that it was just on the extra board part of the time, and, off and on, firing and running.

Q. You, of course, hired out as a fireman?

A. Oh, yes.

Q. Then you fired until you were promoted?

A. That's right.

Q. Since your promotion you operated the engine when you could; when you weren't operating the engine you were fireman?

A. That's right.

Q. You say you have been in regular service now, for about twenty-seven years?

A. Yes sir.

Q. And the last few years since putting the Diesels on, you have operated Diesels as well as steam engines, have you not?

A. Yes sir.

Q. You operate either the Diesel or the steam engine, whichever you are assigned to?

A. Yes sir.

Q. Which division have you been employed in during these twenty-seven years?

A. All on the Grand Junction division, that's east of Grand Junction to Minturn, and Bond, Colorado, rather, that don't include the whole Grand Junction division, however, but that is as far as my seniority goes there.

Q. Your seniority is between Grand Junction, Minturn, and Grand Junction and Bond?

A. Yes.

Q. During these twenty-seven years, I suppose you have had occasion to pass over the main line and the passing [fol. 74] track at Chacra on just numerous occasions?

A. Yes sir.

Q. Passed over it in the daylight and dark, and all seasons of the year?

A. Yes sir.

Q. That passing track there at Chacra, I suppose, has been there as long as you have been working?

A. Yes, was there when I came there.

Q. And the bridge over North Canyon was there when you came there?

A. Yes sir.

Q. And the two tracks, of course, the passing track and the main line, passed over the bridge all that time?

A. Yes sir.

Q. That bridge ever been lighted at any time since you have been working?

A. Not to my knowledge.

Q. Mr. Linkins, you may describe, if you will, the material that has been used to build up the shoulders and the grade there in the vicinity of Chacra?

A. Well, railroad along there has been all slag ballast, built up the shoulders and under the ties, and makes a

solider roadbed, not only there but all over the system, practically.

Q. What color is this slag ballast?

A. That black slag they get from up around them smelters up at Leadville, it comes out——

Q. That slag ballast, you may state whether or not that is used also to build up the grade between these tracks?

A. Yes sir.

Q. All up and down the line, and there, particularly there at Chacra?

A. Yes.

Q. Mr. Linkins, during the years that you have been employed as an engineer and fireman by the Rio Grande, you may state, in a general way, the usage made of this passing track at Chacra?

A. Well, all its for is just when they got one train going [fol. 75] east and one west, and they have to get them by one another, why, they put one on the passing track, and the other holds the main line, and they pass.

Q. What about occasions where something happens to the train, makes stopping necessary?

A. Well, since they installed this C. T. C., when we get something like that, and have to stop, it is customary to try to stop between the switches, so as not to tie the railroad up, and if there is any other trains going in either direction, they can come, in case you are in trouble, then not going to be able to move.

Q. When you are in trouble and the train moves in to Chacra, what does the train crew usually do?

A. Well, they—after the train, you mean after they have stopped or before they have stopped?

Q. Yes, after they have stopped?

A. Well, they get off and try to ascertain what the trouble is.

Q. When you say "they," you refer to the rear end crew?

A. Well, the rear end crew and the head brakeman, he gets off and starts back, and the conductor, he comes forward until he meets the head man, and, of course, the hind man, he has got to go back and flag; that is his duties.

Q. In other words, the rear end brakeman goes back to flag, the conductor comes forward to ascertain what the trouble is?

A. Yes.

Q. The head end brakeman goes back towards the scene of the trouble?

A. Yes.

By Mr. Black:

Q. Now, Mr. Linkins, you were on this train the night that Mr. Pauly was injured, were you not?

A. Yes sir.

Q. What was the number of that train, do you know?

A. Well, we had the Diesel, 545, an extra west. I don't know the symbol number of the train, because I am not required to know that. Its—that is the conductor's business.

Q. It was rather a long train, was it not?

A. It is one of the Utes, yes, we had eighty-seven cars.

[fol. 76] Q. Does that include the caboose?

A. Well, I imagine so.

Q. As the train was traveling westward from Glenwood Springs, you may state whether or not any report was made to you with reference to trouble in the train?

A. Yes, just after we left in Glenwood Springs, by Funston, that is just across the river from Glenwood Springs, just after we left the left switch there at Funston, going around the curve, the head brakeman looked back. He seen this fire, and he reported to me, and I says to him, "Well, I'll give them a good application down around, after they get little speed down South Canyon, trying to kick that brake off. If can't do it, go over to Chacra between switches and stop, because possibly No. 20 is over in there." That is the passenger train, and let them——

Q. What do you mean by "give a good application"?

A. When you have got a brake sticking, lots of times what causes a brake to stick is by making too light a reduction with the brake valve, and if you get one sticking due to that cause, well, then, if you go ahead and make a good heavy reduction of about twenty pounds, you can often get rid of that stuck brake, and you won't have to stop.

Q. Did you look back along the train?

A. No, I am in no position there to look back along the train. I am over on the right-hand side, and it is awful crooked down through there, and there isn't no place between Funston and Chacra I can see no where near back to the rear end.

Q. You were on the right side of the deisel, were you not?
A. Yes sir.
Q. That would be on the north side?
A. North side, yes sir.
Q. The fireman was opposite from you, on the south side?
A. Yes sir.
Q. Did he tell you in what part of the train your trouble had developed?
[fol. 77] A. No; he says, "I see some fire flying back", and he didn't say just where it was, or—that is when I told him I would try and get rid of it by making an application. If we couldn't, we would go down to Chacra and stop.
Q. Did you have any report of any red fusee displayed in the cupola of the caboose?
A. Yes, when coming into Chacra, pretty long strip of straight track, when the engine gets about the east switch of Chacra, you can look back from the left side and you can see the caboose. When we got there the brakeman told me they had a red fusee, so——
Q. Did you look back the north side of the train as you proceeded from Chacra to Funston?
A. No, no use looking back because I can't see no place, too crooked; there is no place I can see back fifteen, twenty feet.
Q. Did you ever have any report that night of sparks coming from the north side of that train?
A. No, nobody ever seen the north side of it unless the rear end seen it. They might have seen it, but head end never could have seen it.
Q. Now, as you pulled into the—into Chacra, you may state where you brought the engine to a stop with reference to the west switch point?
A. Well, there's an automatic block signal about six or seven hundred feet east of the point of the west switch, and I stopped the Diesel engine, when I was sitting in the cab, I could just look up about on an angle about like that and see the position of that signal.
Q. What did the signal show?
A. It was green when I first stopped there.
Q. That's clear signal?
A. Yes.
Q. Now, while you were stopped there, did you receive any information with reference to Mr. Pauly's injury?
A. Well, after the head brakeman went back and met the

rear brakeman, then returned to the engine, he told me that they didn't locate any trouble, but the conductor got hurt.

Q. And what did you do?

[fol. 78] A. Well, I told him he better go down to the telephone and tell the dispatcher that we had the conductor hurt.

Q. What did you do after that?

A. Well, I sat there in the engine, and I sat quite a little while, and this here brakeman got to the phone. He didn't come back so I started down myself, and on the way down I met him, and I went on down to the phone myself, and I got the chief dispatcher on the phone, and told him what had happened, and he says, "You go back there and do all you can for him, Bill". He says, "They have got an ambulance ordered from Funston or Glenwood", and the rear brakeman, he had got to the phone, back to the rear end, before I had got to the phone down on the west end, and he's the one that told the dispatcher, and they had ordered the ambulance, and I said to the dispatcher, I says, "Its a long ways back, and in the meantime he has throwed the signal red, and I can't move". I says, "It is too far to walk back". And I says, "He has got a couple of trains coming from New Castle over here; as soon as they get by here we will cut the engine back and see what we can do." That is what we done.

Q. You moved the Diesel back to the bridge?

A. After these two trains went east through the passing track, Diesel and 3600 it was, I don't know the numbers of them now.

Q. About how long was it after your train had been brought to a stop before you reached Mr. Pauly there in the creek bed?

A. Oh, it must have been around forty minutes; I would say thirty-five, forty minutes.

Q. What did you observe with reference to his condition at that time?

A. Well, he was laying down there in the creek bed, and he was suffering plenty. Every time we touched him why you could sure tell it was hurting him, and I started to feel sorry for him, and he says to me, he says, "Well, don't worry about it, Bill". He says, "I will be all right."

Q. How long was it after you reached Mr. Pauly before the ambulance arrived?

A. Well, we all got busy around there. We was trying to [fol. 79] manufacture some kind of a stretcher to put Pauly

on, to get him up in the caboose where it wouldn't get s
cold. We couldn't find nothing but those little short ca
boose cushions the maintenance has on the caboose; says t
me, "There is a short ladder down there, about six fee
long, go get that and lay these here small caboose cushion
on it, get Pauly up on that, and we will try to get him up i
the caboose."

We just about got this here stretcher here built, wit
this ladder and three small caboose cushions when thi
ambulance showed up; I guess it may have been aroun
twenty-five or thirty minutes.

Q. Then they carried him out?

A. Well, they had a stretcher, regular stretcher wit
wheels and a bed on it; they brought it right down and w
loaded him on. When we picked him up to load on that
why, we hurt him plenty, and he—well, he told me to pic
him up across the hips, it wouldn't hurt so bad, if I go
hold of him right across the hips here. Then we helpe
him up into the—onto the highway with this stretcher, an
got him in the ambulance, and they took him to Glenwood

Q. And I take it that that was the last you saw of him o
that occasion when he was——

A. No, I never seen him then for a long time, till, I gues
it was when we come over to Salt Lake the other time.

Q. Mr. Linkins, describe the night?

A. Well, it had been storming off and on all that nigh
from Bond. Right at the time of the accident it was snow
ing, it seems to me it was snowing, started snowing pretty
hard that night about the time we left Glenwood; it was
black, stormy night, real dark.

Q. How far could you see without a lantern?

A. Well, not very far; have to feel your way.

Q. What is that?

A. I say, you just have to feel your way without a lantern
you would be——

Q. What time of night was it that this accident occurred

A. It was around about 11:50 P. M.

[fol. 80] Q. Was there any snow laying on the tracks o
shoulders at the time you stopped the train?

A. No, there wasn't any snow laying; it was melting as
fast as it was falling.

Q. Did you see the caboose on the—standing on the bridg
from the position down to where Mr. Pauly was?

A. Yes; caboose was up on the bridge, yes.

Q. Lights on the caboose?

A. Yes; there was a light in the caboose.

Q. Where, with respect to the end of the ties was the edge of the caboose, the steps of the caboose?

A. The ends of the ties?

Q. Yes.

A. Well, the caboose steps, I believe, I wouldn't know for sure, I don't know for sure, I believe they were a little bit from the end of the ties, but not very much.

Q. Is the edge—was the outside edge of the caboose practically flush with the ends of the ties?

A. No, I believe it is in a little from the end of the ties.

Q. How much?

A. Well, as I say, I don't know exactly, I don't work around the caboose.

Q. Wouldn't be more than an inch or two, would it?

A. No, it isn't very much.

Q. You may state whether or not there was any walk or handrail on the outside of that bridge at that time?

A. No.

Q. Any lights on the bridge?

A. No, no lights.

Q. Any lights in the yard at any time, between the switch points?

A. There is no lights there, no; that is no yard.

Q. Well, on the switch?

A. Oh, on the switches?

Q. I say, are there any lights between the switch points, between the east and west switch points?

A. No.

[fol. 81] Cross-examination.

By Mr. Van Cott:

Q. Counsel asked you whether there were any lights on the bridge. Are bridges ever lighted on the D. & R. G.?

What is your answer?

A. Well, not that I know of, any bridges.

Q. Have any other railroads?

A. You take bridges around in a city limits, there might be some city lights around them, but——

Q. There might be some city lights, or lights for that purpose, but not for the purpose of illuminating the bridge, so that railroad men won't go off the edge of it?

A. Oh no, not that I ever know of.

Q. Or on any other railroad; ever see any lights of any other——

Seen other railroads, haven't you?

A. I have been on a few of them, but I haven't paid any particular attention whether they were lighting their bridges, or not.

Q. Did you ever see lights between switches where there is a siding?

A. Well, I have seen switch lights, is all, where there was a switch leading off from the siding, maybe a switch light on it, but no electric light, unless it was—happened to be a road crossing, or something, and there might be a light around it.

Q. Trainmen carry their own lights, don't they?

A. Yes, they will have them.

Q. Use those to illuminate anything they want to. Now, you testified that when you were down in the creek bed with Pauly, that you looked up and saw the caboose; did I so understand you?

A. Yes.

Q. Were you able to see it all right from the position you were?

A. Oh yes.

Q. What light did you have to illuminate it?

A. Well, I didn't have no light at all.

Q. Was there any light around there?

A. Well, other brakeman was around, and he had a light. Pauly's light was lying there, it was laying on the ground, it wasn't lit; there was—well, that is about the only light that [fol. 82] was there, was the one Ventura had.

Q. What kind of light was that?

A. Well, one of them little electric lights like all brakemen use.

Q. And that is the light, then, that enabled you to see the caboose up on the creek?

A. No, I could have seen that, I expect, without a light.

Q. Without any light?

A. Yes, there was a light in the caboose, desk light was burning in the caboose; you could have seen that, you know.

Q. That light that was burning in the caboose, did that throw any light on the steps at either end of the caboose?

A. No, it is just a desk light inside there, the only light could get through that would be little light through the windows of the caboose.

Q. The lights through the windows wouldn't be cast upon the steps of the caboose?

A. No.

Q. Would it—So that light coming through the window would tend to obscure the steps rather than to help you see the steps, rather obscure the steps?

A. It wouldn't help you see the steps at all.

Q. You were able to see the steps without the aid of any light at all?

A. Yes, unless it was this here Ventura's light; it might have been throwing some light, enough to detect steps of the caboose.

Q. At any rate, you were able to see the steps on the caboose either with or without Ventura's light?

A. Yes, I believe I would have been, yes.

Q. That is, you would have been able to see the steps without Ventura's light?

A. Yes, I believe so.

Q. Were you able to see the rear steps also?

A. Yes—well, we went up there and crawled up on them when we went in to get those cushions, so I guess we must have seen them.

[fol. 83] Q. I was speaking about when you were down in the creek bed near Pauly, were you able——

A. Well, I don't suppose I paid any attention to whether I could see them or not at that time.

Q. Did you observe the position of anything else on that main line track, other than the caboose, when you were down there in the creek bed; just notice the position of the caboose and the front steps of the caboose, that is, the west end steps?

A. Yes.

Q. You say you noticed the position of the steps at the east end of the caboose when you went up to get the cushions?

A. Yes.

Q. Where were the east steps of the caboose?

A. Well, it seems to me like they was just a little bit east of the end of the bridge.

Q. That is, the east steps of the caboose were a little east of the east end of the bridge?

A. Yes, not very much, but a little; maybe just a couple of feet.

Q. So that there was no drop off of the east steps of the caboose except to the ground below which would be the regular shoulder of the roadbed?

A. Yes.

Q. When the head brakeman told you about seeing the red fusee, where were you from the east switch at Chacra?

A. Well, the engine was just about on the east switch.

Q. About—your engine was just about at the east switch at Chacro when the head brakeman told you he saw a red fusee?

A. Yes.

Q. Now, that red fusee is a danger signal, is it not?

A. Yes; we always stop when we see——

Q. That means to stop right now?

A. Well, you don't have to go to the emergency, or anything like that, but then you want to get stopped.

Q. It means there is something wrong there, and you have got to do something about it?

A. Yes.

[fol. 84] Q. What might that danger be with a moving train, Mr. Linkins?

A. Oh well, it is just—they just want to stop; they have got some brake sticking, or hot box, or something like that. If it was anything real serious, or the train was off the track, or anything, they have an emergency valve in the caboose and they can stop the train.

Mr. Van Cott: I think that is all.

Redirect examination.

By Mr. Black:

Q. Mr. Linkins, could the east end of the caboose have been a few feet west of the east side of the bridge, east end of the bridge?

A. Well, it could have been, but I just say it seems to me like it was just a little bit beyond the east end.

Q. Are you sure about that, or——

A. I am not too sure about it, no, I am not. I am just kind of ahead of—well, never paid that close attention, you know.

Q. I see.

A. But I don't never remember, just happened to get on the bridge and went up on that caboose to get those cushions.

Q. Mr. Linkins, when you were there in the creek bed with Mr. Pauly, you may state whether or not there were any yellow fusees burning?

A. Not while I was there, that I remember of. Of course, it was quite a while before I got there, there might have been one when he first fell, but, of course, it wouldn't last over ten minutes, and it was longer than that when we got back there.

Q. Was it before or after you saw—the fireman reported the red fusee in the cupola, when you were informed of the sticking brake?

A. Well, he reported it to me first when we first left Funston, down about two miles this side of Funston. Then he didn't report the red fusee burning until we got to the east switch at Chacra.

Q. In other words, you were informed of this sticking brake before you were informed by the fusee?

A. Yes, that is when I made the good heavy reduction, coming down there around South Canyon, trying to get rid [fol. 85] of it, which you can often do, then you don't have to stop, see.

Q. Were you able to get rid of it by the application?

A. I guess not because they still had the red fusee burning when we got to Chacra, so I guess not.

Q. As I understand it, the engine was about two miles out of Funston when you received the information about the sticking brake?

A. Yes, about that.

Q. How far is it from Funston to Chacra?

A. Oh, about six miles.

Q. So you traveled about four miles before you were informed of the red fusee?

A. Yes.

Mr. Black: That's all.

Recross-examination.

By Mr. Van Cott:

Q. Mr. Linkins, which side did you get—did you go up to get the caboose cushions, did you go up——

A. Right up on the south side, got on the south side of the caboose.

Q. The south side, that is the side on which Mr. Pauly fell?

A. Yes, right——

Q. Went up the steps at the east end of the caboose?

A. Yes.

Q. If those steps had been out over the bridge, flush with the edge of the bridge, you would have to cat-walk along that stringer, would you?

A. Yes; that is the reason, I didn't remember doing that, that is the reason I thought that the east end of the caboose was a little bit beyond the east end of the bridge.

Q. You don't recall having to make any abnormal step up to that step?

A. No, I don't.

Q. Your best recollection is it is about a little bit east of the east end of the bridge, is that right?

A. Yes.

[fol. 86] HARRY O. PAULY, the plaintiff herein, was called as a witness, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Black:

Q. Your name is Harry O. Pauly, is it not?

A. Yes sir.

Q. You reside at Grand Junction, Colorado?

A. Yes sir.

Q. Mr. Pauly, calling your attention to the 27th day of January of this year, you may state how old you were at that time?

A. Thirty-six.

Q. You were then employed by the defendant here, were you not?

A. Yes sir.

Q. When did you first go to work for the defendant?

A. When I was about ten years old.

Q. Where was that?

A. Salida, as messenger boy for the Superintendent of——

Q. After you worked a little bit, did you continue to work?

A. I did; then I went calling, and during my school period I went on the section, the B. & B. Paint gang, on up. Finally, I transferred to the Transportation Department, in 1927, October; in train service seventeen years.

Q. Been in train service seventeen years, and your seniority then dates from your employment in '27?

A. That is in train service.

Q. That is what I mean.

A. Yes.

Q. Your seniority in train service dates from '27?

A. Yes.

Q. What do you mean by "seniority"?

A. Well, my right to hold the job.

Q. Well, explain that to the jury, they are not railroad people?

A. Well, according to the number of years that you work, that you hold seniority, the right to hold seniority, the right to hold certain jobs and be promoted, or progress along in that line of work.

Q. In other words, the longer you work, the more secure [fol. 87] becomes your employment?

A. That's right.

Q. To what extent does promotion depend on seniority?

A. Well, you have ability, of course, seniority has something to do with it, but ability to perform your duties in a normal and safe manner will lead to promotion, if you are able to handle the duties.

Q. Having that in mind, what effect does seniority have on this matter of promotion, assuming that you have the abilities you have spoken of?

A. They have great weight.

Q. Well, promotion depends on seniority to a great extent, does it not?

A. That's right.

Q. In other words, a young man going braking today, couldn't expect to be a conductor tomorrow, could he?

A. That's right. A number of years' service determines that.

Q. When were you promoted from brakeman to conductor?

A. How is that?

Q. When were you promoted from brakeman to conductor?

A. Nineteen—let's see, 1940, I guess it was.

Q. Promotion dates from 1940, you have the information with you?

A. I have my conductor's card. (Witness takes something from his wallet). Let's see, no, October, 1943, rules and examination on conductors.

Q. What is that?

A. October 30, 1943, for rules of examination as conductors.

Q. And did you serve, and were you employed as a conductor since that date?

A. That's right, yes sir.

Q. Were you a regular conductor after the promotion mentioned?

A. On this trip, extra conductor, on extra, conductor.

Q. How long did you serve as extra conductor?

A. Well, since I was promoted.

[fol. 88] Q. And at the time of your injury——

A. Off and on, that is.

Q. At the time of your injury you had, you were still on the extra board, as far as being a conductor was concerned?

A. I was; when not employed as a conductor, I was a regular brakeman.

Q. Under what circumstances would you act as conductor?

A. Whenever the extra board—the extra conductor's board had been exhausted of extra conductors, and my seniority entitled me to run a train whenever a conductor should be called.

Q. Then your seniority as a conductor starts in '43; your seniority as a brakeman in '27?

A. Yes sir.

Q. Is there a difference in rate of pay in passenger service and freight service?

A. Yes, there is. Just a moment, that card I showed you showed re-examination of rules in '43. I was promoted in '42, July of '42.

Q. Promoted in '42, re-examined in '43?

A. That's right.

Q. Now, tell the jury about any difference that may exist, as far as pay is concerned, in between passenger service and freight service.

A. Rate of pay is higher in freight service; passenger service, I think, they are on a monthly basis.

Q. I see.

A. Freight service, your pay fluctuates for the number of trips you make.

By Mr. Black:

Q. Mr. Pauly, pay attention to the question, please. I want to know if you were continually in freight service as a conductor after you were re-examined in October, 1941?

A. I was in continuous service as conductor and brakeman.

Q. And brakeman?

A. That's correct.

Q. On what Division were you employed as conductor and brakeman, by the defendant.

[fol. 89] A. Grand Junction Division.

Q. And between what points did that part of the Division extend?

A. My part was eastward, division out of Grand Junction; that is, from Grand Junction to Minturn and Grand Junction to Bond, on cut-off.

Q. Will you tell the jury the difference in those two runs, just so we will have that before us. You go on a different railroad part of the way to Minturn, then to Bond?

A. Well, from Grand Junction to Dotsero is junction point for the cut-off over the Moffat line, and from Dotsero over to Minturn is over on the old main line, we call it. There is a difference there; you turn off and go this way; and this way you go on the main line into Minturn, I guess.

Q. Toward the cut-off, that is, toward the new Moffat Tunnel, you go to Dotsero?

A. Yes sir.

Q. And on the regular old time railroad, you go down to Minturn?

A. That's right.

Q. Now, Mr. Pauly, you may state whether or not the tracks of the company, as they proceed from Grand Junction to Bond one way and from Grand Junction to Minturn the other way, are single track main line?

A. Single track main line.

Q. And, of course, they have various switch tracks for passing, and various things of that kind?

A. Yes sir.

Q. You are acquainted, are you not, with the various stations and passing switches of the part of the railroad that you were employed on?

A. Yes sir.

Q. I naturally suppose that in the seventeen years you have worked, you had occasion to pass over on all the road on just numerous occasions?

A. Yes sir.

[fol. 90] Q. I call your attention, Mr. Pauly, to the early evening of the 27th day of January of this year, and will ask you if you were called as conductor on one of the defendant's freight trains?

A. Yes sir, at Bond, Colorado.

Q. You were called out of Bond?

A. Yes sir; 7:15 P. M., and departed at 9:25 P. M.

Q. Departed at 9:25; what was the number of the train that you were on at that time?

A. Ute 27.

Q. What kind of train was it?

A. Mixed freight.

Q. How many cars, if you know?

A. Eighty-six cars, and a caboose, makes a total of eighty-seven cars.

Q. And the names and number of the crew, if you know?

A. Mr. Bill Linkins was engineer, I don't know the name of his fireman; my crew, head brakeman was J. E. Arvis, rear brakeman, H. L. Ventura.

Q. You were the conductor?

A. Yes.

Q. As these freight trains move through the country, will you tell the jury where the various members of the crew are located on the train?

A. Head end brakeman must be on the head engine unless—well, not necessarily left-hand side, but he should be in a position on the head end that he may look his train over and note any abnormal condition relating thereto; that is, for the protection of the train, safety of the train.

Q. Does he have any duties with respect to taking signals from the rear end?

A. Yes sir.

Q. What are those duties?

A. He shall answer them and notify the engineer that he has observed such signals from the hind end, if he receives them.

[fol. 91] Q. The conductor, and the rear end brakeman, of course, are on the caboose?

A. Yes sir.

Q. That is always the last car, of course?

A. Yes sir.

Q. What are the duties of the rear end brakeman?

A. Duties of the rear end brakeman are to protect his train; that is, he is what we call the "flagman". Any abnormal stops, he is supposed to get down with his flagging equipment, and go immediately back to protect the rear of his train. During—while the train is running and conductor is busy at his desk, his duties is to be out in the cupola, permit him to see the length of the train at greatest time he can see it, and report any abnormalities to the conductor, or notify any conditions that should pertain to the general safety of the train.

Q. What are the duties of the conductor, on a moving train?

A. Conductor shall check his switch list, way-bills, know the number of cars on his train, the contents, relation to explosives in his train, whether they are at proper distance from the caboose, or from the engine, figure up his tonnage, and general director work; he is the man that shall direct the work that is supposed to be done.

Q. In the event that difficulties of any kind develop while the train is in movement, what are the duties of the conductor?

A. Conductor shall—I don't exactly get you, if you mean abnormalities to the train, and I am so notified by the brakeman?

Q. Yes.

A. Flagman shall go back and the conductor shall go over to see what is the matter with the train, safety of the train.

Q. In other words, the conductor shall go to the point of difficulty, wherever that is?

A. That's right, yes sir.

Q. I call your attention, Mr. Pauly, to the main line and [fol. 92] the switch tracks at Chacra, will ask you if you are acquainted with those tracks, the switches at either switch point?

A. Yes sir.

Q. And have had occasion to use them, I suppose, during all the seventeen years of your employment?

A. Not exactly seventeen years, I worked—part of my seniority was served in Salida——

Q. But at least since you have been located at Grand Junction?

A. Yes, eight years in Grand Junction; I have worked steady out of Grand Junction for eight years.

Q. During that eight years, it has been necessary for you to run trains over this—these tracks, going both ways, of course?

A. Yes sir.

Q. And then you are well acquainted with this main line track and the switch; will you tell the jury how those grades upon which these tracks are constructed, are built, of what material are they built?

A. The grade is curved down here, that is, going west, and uphill going east, it is on a big long curve to the left at that particular spot, at Chacra.

Q. Of what materials are these grades built?

A. Black slag.

Q. Mr. Pauly, during the years that you have worked for the defendant, have you noted trains passing standing trains at this switch, at this passing track, I should say?

A. Yes, I have, on a number of occasions.

Q. Have you had occasion to observe trains passing on the switch track while other trains were standing on the main line track?

A. I have.

Q. What can you say with reference to the speed that those trains usually and sometimes travel at, as they are passing on the passing track?

A. Well, at that particular spot, the C. T. C. territory, and all switches are operated by centralized traffic control from a centralized station, and these switches have in-going [fol. 93] and out-going speeds. There is no limit to the speed in going through the passing track, that I can see. You can—the outgoing switch permits a speed of thirty-one miles an hour.

Q. And what have you personally noticed with reference to the speed of trains passing on that passing track?

A. Well, I would say they would go through there twenty-thirty- about twenty miles an hour, twenty, twenty-five miles an hour.

Q. That has been your observation?

A. Yes sir.

Q. Mr. Pauly, I again direct your attention to the night of January 27th of this year, and will ask you if you recall the train that you were on pulling out of Glenwood Springs?

A. Yes sir.

Q. Headed west?

A. Yes sir.

Q. I believe this is in the record, that Funston is one mile out of Glenwood Springs, to the west; will you describe for the jury, the tracks and the roadbed, as they proceed westward from Funston?

A. That particular strip of track is very crooked and narrow, and runs through a canyon.

Q. And——

A. It is all black slag, down-hill, yes sir.

Q. As the rear end of the train left the switch, at Funston, you may state whether or not you were in the cupola of the caboose?

A. I was sitting down. May I—yes, I was in the cupola, on the right-hand side of the caboose.

Q. The right-hand side; that, of course, is the conductor's side, as you testified?

A. That is commonly called "the conductor's side"; of course, what we call "the brakeman's side" and "the conductor's side"—in the parlance of railroad language would be where the brakeman generally sits, where I can see the train most of the way, and the conductor has that side—refer to it his side; doesn't make any difference, that is, it isn't assigned position.

[fol. 94] By Mr. Black:

Q. As the train moved westward, after it left Funston, you may tell the jury whether or not you had a vision of any part of the train ahead; I am referring to the right side of the train, that would be the north side?

A. Oh, I would say first, oh, maybe eight cars, not over that, around those curves.

Q. Were there times when you could see farther up the train than eight cars?

A. No sir.

Q. There weren't times when you could see farther up?

A. No sir.

Q. Now, after the train left Funston——

A. I might be able to see, but as I can recollect, I wouldn't say very much farther than eight, ten cars.

Q. Well, it only curves to the right as you come out of Funston?

A. To the right, yes, but I believe there are a few small curves.

Q. After the part of the train that you were on passed the west switch, at Funston, you may state whether or not you received any report from the rear end brakeman, and, if so, tell us about where it was?

A. Well, as near as I can recollect, I was sitting on my side of the caboose, and my brakeman called me over and he said, "I see fire flying on the car, will you look at it". So I crossed over to his side of the caboose, and saw fire flying from the car, about ten or fifteen cars ahead of the caboose. There was yellow-white, or yellow flames, going around the wheel, like a sticking brake.

Q. And what did you determine, if you did determine the question, as to what caused that fire?

A. I think that it was a sticking brake.

Q. Is that a usual manifestation of a sticking brake?

A. Yes sir, usually.

Q. And when you made that observation, what, if anything, did you do?

A. I told the rear brakeman that we should stop that train, and ascertain the cause, and rectify it as much as we [fol. 95] could, and that I put out a red fusee, to let the head end know that the train should be stopped, that there was trouble on the rear end.

Q. And about—well, withdraw that for the time. Did you stick out a red fusee?

A. Yes sir, I put the red fusee on the left-hand side of the caboose cupola, in the window frame.

Q. And that was to notify the head end that there was trouble in the train, the train should be stopped?

A. Yes sir.

Q. At any time after that red fusee was put out, did you have occasion to look along the north side of the train?

A. Well, I went back to my side of the train, yes sir.

Q. Did you look along the north side of the train?

A. Yes sir.

Q. Were there times when you had, within the range of your vision, ten, fifteen or twenty cars to the rear of that train?

A. Yes sir.

Q. You may state whether or not you saw any fire come out of the north side of the train?

A. I saw no fire on my side of the train.

Q. And could you have seen it if there had been any fire?

A. Not over ten to fifteen cars away I couldn't, no, not around those curves; those are very sharp curves.

Q. I mean anywhere between Chacra and Funston?

A. No sir.

Q. Now, Mr. Pauly, about how far was the rear end of your train from the west, or the east switch at Chacra, when you put out the red fusee?

A. When I put out the red fusee, about South Canyon, as I remember it, I made a remark to the rear brakeman, that we should have the red fusee out in time in order that as we approached Chacra, that the head end would have time to see the signal, so that we could stop at Chacra, that there would be trouble.

Q. It was your intention that the train be stopped at Chacra?

A. That is right, Chacra is the high-balling station, and they would be looking out for signals either to go ahead or stop.

[fol. 96] Q. Tell the jury what you mean by "high-ball" station?

A. "High-ball" is the "go ahead" sign, that everything is all right with the train, and they may pass that station.

Q. How is that high-ball signal given?

A. Raise your lantern up and down, like that, that is vertical motion.

Q. One of the boys on the caboose gives the head end the highball signal as they go around that big sweeping curve?

A. Yes, if the train is all right.

Q. That is what I mean.

A. Yes sir. If something is the matter, then we put out a danger signal, or some other kind of signal, the train should be stopped at that station, or where they may be able to see the hind end.

Q. In putting out that red fusee, you may state whether or not it was your intention for the train to be stopped immediately, or stopped when it reached Chacra?

A. Well, I knew that they couldn't see that signal before they came into Chacra, around that big curve; that is the only place they would be able to see that curve and I wanted

that fusee out in plenty time so that they could catch that particular signal for that train to be stopped there.

Q. When a train is stopped on such a signal as was exhibited under your direction from the cupola of your caboose because of a sticking brake, what are the duties of the conductor, and what are the duties of the rear-end brakeman, and what are the duties of the head-end brakeman?

A. Well, start from the head-end, the head-end brakeman should be looking back for——

Q. I mean after the train stops, Mr. Pauly, the train has been stopped, now, in response to the signal?

A. I see.

Q. When it is stopped, what are the duties of the head and rear brakemen, the rear——

A. After the train is stopped, the head-end brakeman will start from head-end toward the rear end; in that instance, the rear brakeman or flagman, shall pick up a particular signal, whether daylight signals—take daylight signals—if night signals, go back immediately to protect the rear of the train, and the conductor will go over the train [fol. 97] to meet head-end brakeman, or, if he gets to the trouble first, then rectify it, then give signal to head-end he has fixed it, then proceed.

Q. In other words, the conductor starts toward the scene of the trouble one way, and the head-end brakeman the other?

A. Yes sir.

Q. Now, as I understand it, when this train finally—when the rear end of this train finally cleared the east switch point at Chacra, the train began to stop?

A. Yes sir.

Q. And what, under those circumstances what did your duties require you to do?

A. Immediately go over and ascertain the cause of the trouble on my train.

Q. And where did you have in mind that this trouble was?

A. On the left-hand side of the train where I saw the fire.

Q. Ten or fifteen car lengths?

A. Yes sir.

Q. Before the train came to a stop, you may tell the jury what you did before it came to a stop; well, as the

train was coming to a stop, Mr. Pauly, was slowing down and coming to a stop, what did you do?

A. Well, as near as I remember, I picked up my light, yellow fusee, and my coat, put them on, and told my rear-end brakeman to go back and protect the rear end of the train, and I would go over and check that car.

Q. Did you do anything with reference to putting batteries in your lantern?

A. I remember putting battery in my lantern somewhere in Glenwood Canyon, I don't know the exact spot.

Q. That would be after you left Glenwood Springs, of course?

A. Yes sir.

Q. As your train was coming to a stop, about the time it did stop, you may state whether or not any other train was passing on the passing track?

[fol. 98] A. As I recall it, we were just pulling to a stop when we saw a headlight coming up through the passing track.

Q. By the way, of course, you were stopped on the main line?

A. Yes, we were stopped on the main line; just pulling up to stop as we saw that headlight coming through the pass.

Q. All right, go ahead.

A. After I put on my hat and coat and grabbed up my lantern and yellow fusee, I stepped out of the west end door, and, as I did so, this, the engine on the passing track was just passing the west end of the caboose, and I checked the number on that engine, and immediately turned around to step down on the left, to go check that car.

Q. Now, you saw this train pass you; and what train was it, by the way?

A. No. 20.

Q. Is that a passenger train?

A. Yes sir.

Q. You were able to recognize the number on the locomotive, I take it.

A. Yes sir.

Q. They have lights, do they not?

A. Yes sir.

Q. Mr. Pauly, what kind of a night was it?

A. It was very dark, and stormy.

Q. When did it start to storm?

A. As near as I can recall, it was just beginning to storm, oh, maybe a few minutes before we got down; it stormed all through the canyon, that is.

Q. What kind of storm was it?

A. Snowstorm, no moon.

Q. And the night was dark?

A. Yes sir.

Q. During the years that you have worked for the defendant here as brakeman and as conductor, have you ever had, or received any instructions with reference to the proper side of the train from which to alight under different circumstances?

A. Well, safe course is the course to pursue; one of the [fol. 99] rules of the company, always pursue the safe course.

Q. Under that rule which would be the safe side to alight from, if the train were stopped on the main line track at Chacra?

Q. At night.

A. Left-side of the train.

Q. Why?

A. To get away from a passing train; if you stepped off where a train was passing, and you were liable to stumble, and therefore stumble under the wheels of that train.

Q. About what is the overhang of an ordinary freight car caboose?

A. I don't believe I know the exact measurements, I would say two feet.

Q. In other words, the——

A. From the truck.

Q. Protrudes out beyond the rail a couple of feet; you are not sure about that?

A. No; I think that is pretty close, two feet, two feet and a half.

Q. You might state if you know whether or not there is any custom and practice followed by railroad men engaged in train service, either as conductors or brakemen, with references to getting off on the side of the train towards which another train may be passing?

A. Well, that is never permissible.

Q. Have you had any instructions to that effect while you were working?

A. Well, we operate by safety rules, we have a Safety Rules book, but the safe course is the course to always pursue. You must never get off where a train is passing.

Q. Now, Mr. Pauly, having in mind a state of facts where the conductor at the rear of a freight train has observed sparks and fire flying from the left-hand side of a car ten or fifteen cars up from the caboose, and the train is eventually stopped, on signal, for the purpose of making an inspection, which would be the proper side for the conductor to get off on?

[fol. 100] A. Well, naturally on the—naturally on the side where he had noticed the trouble.

Q. And why is that?

A. Well, you would assume that you would locate the trouble on that side; that would be greater——

Q. If he would go up the—up along the train on the other side, would that necessitate crossing over drawbars?

A. Yes, very dangerous to crawl through a train; train might go ahead and start up, something like that, and you would be in a bad position.

By Mr. Black:

Q. Now, Mr. Pauly, calling your attention to the time shortly following the stopping of the train that you were working on at Chacra, you may state whether or not you saw the rear-end brakeman dismount from the train, and leave?

A. I can't recall that now, that I did.

Q. Can't recall seeing him leave?

A. No sir.

Q. But you had given him instructions, I think you stated?

A. Yes sir.

Q. Now, you told the jury that as the train came to a stop you had your coat on, I think you said, you had your lantern in your hand, and a yellow fusee?

A. Yes sir.

Q. After the train had stopped, what did you do with the yellow fusee?

A. As I recall it now, just as I checked the number on the engine, number on No. 20, I turned around, lit the fusee and immediately stepped off on the left-hand side to go down along my train.

Q. And what happened then?

A. Well, I looked down, looked all black, looked like I was alighting on the right-of-way, on the shoulder of the right-of-way.

Q. You just stepped right off into space?

A. Then, as I know it, I just hung there for just an instant, and fell right off into space, yes sir.

Q. Tell the jury how you lighted, and how you lit that [fol. 101] yellow fusee?

A. Well, I—of course, the yellow fusee is about a foot long; of course, they have a cap on it, what they call the "strike cap". You pull that up and expose the strike, and then twist it off and give a downward movement, never towards you because if it burns you or sets you on fire, it is very dangerous, always away from you, as it sputters and makes smoke, and it is made mostly of sulphur.

Q. What do you mean by "sputtering"? Does it throw off sparks, and things of that kind?

A. Well, sputtering, yes, and drops—a white burning mass, as it burns it drops off, very smoky.

Q. And when, with reference to the time you stepped off the caboose, into the creek, did you strike this yellow fusee?

A. Will you state that again, Mr. Black?

Q. When, with reference to the time you stepped off the caboose, did you strike the yellow fusee?

A. Well, just the instant before I stepped off.

Q. Why did you strike the fusee?

A. Well, I was going along the, my train, and the yellow fusee would be giving a certain signal to my head brakeman, that I was along the train, to—more of a signal that I could, intends to light, I could see to examine the trouble in my train.

Q. Now, tell me, did you have a lantern at that time?

A. Yes sir.

Q. Tell the jury about that lantern, will you please?

A. An electric star—an electric star hand lighter, as they would call it, four cell battery; with, that is, there is a spot in the spray of light, as they call them; that is, two globes, one side you would have for a small beam of light, what they call a "spot". The other would spread the light out for a spray light.

Q. Have a spray and a spot?

A. Yes sir.

Q. Tell us about this spot light, what do you use that for?

A. Check numbers of cars, mostly.

[fol. 102] Q. That is, to concentrate a small concentrated body of light on the side of a car, or engine, things of that kind?

A. I might say you have that spot on, you slip your arm through, as the conductor goes down the train, he has a switch list, and he can check the numbers as he goes right along, pick out those numbers.

Q. Has a light over his arm?

A. As you walk along, hit those numbers as you are going along, and you can pick those numbers as you walk down the train.

Q. What about the spray?

A. Spray is used for hand signals.

Q. Tell the jury what they are, hand signals?

A. As I explained a minute ago, for high-balling or stopping the train, or go ahead, back up, pertaining to hand signals; there is the night indication, four-hand signals; that is the correct way to say that.

Q. What uses do trainmen, conductors and brakemen, make of these lights? What do you use them for, in addition to giving signals, if anything?

A. Well, the correct usage, the correct usage is not for illumination, they are for giving night hand signals.

Q. I see.

A. The opposite of day hand signals.

Q. Now, Mr. Pauly, you stated that you just stepped right off and went right down into the creek?

A. Yes sir.

Q. And—I mean on the creek bed. Which door of the caboose did you dismount from?

A. Well, I went out the west door, and dismounted from the west end of the caboose.

Q. That would be the west and south?

A. Well, no, east and west, would be the west end.

Q. The west end, on the south side?

A. On the south side, yes sir, pardon me.

Q. Was there any particular reason for you, as con-
[fol. 103] ductor, dismounting from the west and south corner of the caboose?

A. Yes, I couldn't get off on the inside on account of the passing train. My trouble was—naturally my trouble was on the left-hand side. My mind was to get down on the left-hand side to ascertain what that trouble was, as fast as I could, and in order to expedite the movement of

my train, without further delay, and, naturally, my mo
ment would be to turn to the left, and go down along th
side of the train.

Q. Now, Mr. Pauly, there is a map or a profile here
the board, offered and received in evidence; I call yo
attention to the fact that the engineer described and
ferred to these pillars that I am pointing to, as "bents
on this bridge. Do you know about where, with respe
to any of those bents, you fell off into the creek?

A. From the east abutment it looks like the one, tw
third bent.

Q. Come over and take a pointer and point it out
the jury. Well, I can—is this the one you have in mind

A. Yes.

Mr. Black: And may the record show that Mr. Paul
indicates the third bent, disregarding the abutment a
the eastern edge of the bridge.

Q. I show you, Mr. Pauly, some of the exhibits tha
have been offered in evidence, and will ask you to examine
and state whether or not, from any of the exhibits you ca
identify the approximate place where you landed on th
creek-bed?

A. (Witness looks at the pictures.) Well, I believe this
is the best one.

Q. Will you take the pen and on the first photograph
that is contained in the bundle of photographs, marked
"Exhibit N" mark the approximate place where you
landed when you fell from the bridge down into the creek?

Mr. Black: The witness has now placed a mark on Ex-
hibit "C", as indicating the place where he fell, and also
marked on the first photograph in Exhibit "N"——

[fol. 104] By Mr. Black:

Q. Mr. Pauly, I think I better call your attention to the
fact that Exhibit C is the other side of the bridge, so I
believe maybe you have made a little mistake on that. Will
you look that over and see if I am not correct on that?

A. Be— Gosh, you sure are. I am wrong, sure.

Q. You are not the first one that has ever been wrong.

A. That's right, that is my error there.

The Court: Pick one out.

Q. Pick one out; that is the right side of the bridge.

Mr. Black: And may the record show the witness has made a mark on Exhibit "K"?

The Court: It may.

Q. Now, Mr. Pauly, you are acquainted with these tracks, I think you said yesterday, and the switch at Chacra, and have been for eight years, and upwards?

A. Yes sir.

Q. During the time that you were employed, and before you were injured, were there ever any walks—foot-walks, or guard-rails— on the bridge at any time?

A. No sir.

Q. Or any light?

A. No lights.

Q. Were there any lights between switch points except the lights at the switch?

A. No sir.

Q. And at the time you stepped off the boxcar, or off the caboose, you may state whether or not you could see the bridge?

A. No sir, I didn't see any bridge. It looked at me there was— like the shoulder of the ground. It was all black before me.

Q. That is the way it appeared at the time you made the step?

A. Yes sir.

Q. I think you said you had in your hand at that time a burning fusee, in your hand?

A. Yes sir.

Mr. Black: That's all. Thanks. You may cross examine.

[fol. 105] Cross examination.

By Mr. Van Cott:

Q. Do I understand then, Mr. Pauly, before you stepped down from the caboose that you did look?

A. Yes sir.

Q. Did you cast the light of your lantern down so that it would, so that the light would shine on what was below the steps of the caboose?

A. I never made any examination with my lantern as to where I was stepping, but just like all railroad men when they are getting on and off of a car, they made a glance.

It looked like it was black when I stepped, looked like I was still standing on the right-of-way.

Q. The rays of your light were cast down on what was below?

A. I guess they were, I didn't make any examination as to——

Q. I am not asking you to guess, I am asking you whether they were or were not on, if you recall?

Mr. Black: Just a minute, he didn't say he was guessing.

Mr. Van Cott: Will you read the answer, please, Miss Reporter.

(Reporter reads last answer.)

Q. Just limit yourself to my question, if you will, please, and tell me now, did you look or did you not?

A. I looked down, certainly.

Q. Did you turn the light from your lantern down onto the space below the caboose, or did you not?

A. I glanced down, and it looked, I didn't make any examination with my light.

Q. You did not?

A. I did not.

Q. Either with your electric light or with your yellow fusee that you had lighted?

A. No sir.

By Mr. Van Cott:

Q. Have you the lantern that you had with you that night?

A. With me, you mean?

[fol. 106] Q. Yes.

A. No, I haven't.

Q. It was a star lantern, you say?

A. Yes sir.

Q. Let me ask you, Mr. Pauly, if this lantern that has been marked "Exhibit 3" is the same kind of lantern as the one you carried on the night of the accident?

A. Yes sir.

Q. The one that you carried was your own lantern, I think you stated?

A. Yes sir.

Q. You testified, I believe, that you had just put a new set of batteries in it before you got off the caboose?

A. I believe you mean four-cell, don't you?

Q. Very well.

A. Yes.

Q. You had put in a new battery, a new four-cell battery into your lamp?

A. Yes sir.

Q. And were the globes in good condition?

A. Yes sir.

Q. That lamp that you had at that time would throw as much light as this kind of a lantern would throw, then, under the best conditions?

A. Under the best conditions, yes sir.

Q. Let me call your attention to the fact that this lantern has two globes, one of them is what you call "flood light", is it?

A. Flood or spray, yes sir.

Q. Flood or spray, and the other is a spot light?

A. Spot light, yes sir.

Q. The spot light has a reflector back of it, doesn't it?

A. Yes sir.

Q. You turn on one or the other by manipulating this switch, do you not?

Yes sir.

Q. You pull it up for the spot light?

[fol. 107] A. Yes sir.

Q. You push it down for the flood light?

A. That's right.

Q. And you have, in between the two positions, you turn it off?

A. Off, yes sir.

Q. That is the kind of light you had with you that night?

A. Yes sir.

Q. Now, you can carry that light by hanging the bail of the lantern over you arm, can't you?

A. Yes sir.

Q. Or you can hold it in your hand?

A. Yes sir.

Q. In any event, whether you have it in your hand or in your—over your arm, the result is that if your light is turned on, the rays of the light are cast down—I don't mean to get in your way—are cast down, are they not?

A. Yes sir.

Q. And, so far as the light of your lantern is concerned, you are looking from a shadow above the lantern, too?

A. That's right.

Q. Now, you have been railroading quite a number of years; do you remember when the lights that trainmen carried were kerosene lanterns?

A. Yes sir.

Q. How many years ago was that? Well, just approximately, ten or twelve, fifteen years ago, would you say?

A. I believe in 1939.

Q. 1939?

A. Mr. Van Cott, I believe——

Q. And with the kerosene light, the kerosene was in a well at the bottom of the light, wasn't it?

A. Yes.

Q. So that in order to cast your light from the kerosene lantern down, you had to tip your lamp, did you not?

A. See, so long ago, let's see, yes, that's right, you would have your hand on the side of the bail, that's right.

[fol. 108] A. With the kerosene lamp, instead of being open at the bottom, for the light to shine down, you had the well that contained the kerosene at the bottom, didn't you?

A. Oh, yes sir.

Q. So that the rays of light wouldn't go straight down, as they will with this lantern?

A. More sideways.

Q. Do you remember that the Brotherhoods made a demand of the railroad that they have electric light?

A. That's right.

Q. And the purpose was that very purpose, wasn't it, so that the rays of the light would shine down?

A. I don't know what the purpose was, they wanted to get away from oil. That was a cleaner light. When we had the oil light, we had to take care of our own light. This is more clean, easier to operate.

Q. Don't you recall that the purpose the Brotherhoods had, in demanding those lights, was so that there would be light cast down, so that as you mounted a car, there would be light on the step, and as you dismounted from a car there would be light on the ground?

A. I don't know as that stipulation was made in their demand or not; I couldn't say.

Q. At any rate, that is the fact, isn't it?

Q. No, pardon me; it is the fact that as you mount a car with that lantern here in your hand or on your arm, and

if you have the light on, it casts a light on the steps you are going to get onto, doesn't it?

A. Oh yes.

Q. Dismounting from a car it casts a light on the ground below you?

A. That's right.

Q. You use it for that purpose, right along?

A. Not necessarily, no.

Q. You mean to tell the jury, if you are stepping off into something where there is no light, that you don't use the [fol. 109] illumination from this lantern to show you where you are going?

A. You mean to tell me that on the side of a car, that each man is hanging on, he takes the lantern out to see where he is stepping?

Q. I am asking you, when you are dismounting from a car, in the regular course of your duties as a trainman, whether you use the light from your lantern to show where you are stepping.

A. Well, the rays would be, naturally, down.

Q. You look down where those rays are, don't you?

A. That's right, glance down, naturally, look.

Q. As you look along the roadbed when it is dark, you use the rays of your lantern ahead of you to show you where you are going?

A. No sir.

Q. Why not?

A. You walk around, you have the rays there, you don't use it to look around where you are walking; just as you stated, the rays are already there; you don't use it walking along.

Q. Don't you look where the rays are?

A. You look down at the ground, not in the sense you say you use the lantern. I don't get what you mean, but the rays are there, as you walk along.

Q. As you walk along, you look where the rays are cast on the ground, do you not.

A. All right.

Q. Now, that spot light, how far will that cast a beam of light, Mr. Pauly, when it is a lamp in good condition such as you say yours was?

A. I couldn't say.

Q. Well, it will cast it farther than an ordinary flashlight, won't it?

A. Well, I couldn't say that, I haven't made any comparison.

Q. Well, you know, do you not, that that—the spot light would cast a beam of light farther than the length of this room?

A. I don't know whether that spot light will, or not, no.

Q. How many years have you been using this kind of a lantern?

A. Oh, about two years.

Q. And you can't tell the jury how far it will throw a [fol. 110] spot light, how far the spot light will throw a ray?

A. I haven't used it for that purpose, throwing out a light. I have used my spot light checking my train, as I walked down the side of my train.

Q. How far away from a car can you read the numerals on a car, with your spot light?

A. That spot light, ten to fifteen feet.

Q. You think that is as far as you can do it. I am talking about a dark night, now.

A. I'd say—I don't know, I have never measured the distance, I couldn't tell you.

Q. You remember when I took your deposition?

A. Yes sir.

Q. You testified that it would cast a beam of light across the room in which I took your deposition; you remember that, don't you?

A. I can't remember all the statements I made; I probably did.

Q. Well, that was correct, then, wasn't it?

A. Yes sir.

Q. These lights show up much stronger when you are in the dark, than they do in a light room such as this, don't they?

A. Yes sir.

Q. You stated that you had noticed no change in your right hand in the last three or four months, in answer to a question put to you by Mr. Black, do you remember giving that evidence?

A. Yes sir.

Q. You remember my taking your deposition on August 1, 1944, here in Salt Lake City, do you not?

A. Yes sir.

Q. Over in the office of the court reporter of the United States District Court?

A. Yes sir.

Q. You remember you were sworn to tell the truth, the whole truth, and nothing but the truth?

A. Yes sir.

[fol. 111] Q. And you heeded that admonition throughout your evidence, did you not?

A. I tried to, yes sir.

Q. Do you remember being asked the following questions and giving the following answers?

Q. "Q. To what extent is the strength of your hand present?

"A. I don't know what you mean. I can grip—it is getting stronger; the doctors say it will come back in time.

"Q. Would the condition of your hand make it impossible for you to work as a railroad brakeman?

"A. No sir; I have use of it; I have feeling through it. It will come back in time.

"Q. It is improving, is it?

"A. Yes sir."

Do you remember giving that evidence?

A. Yes sir.

Q. Is that true?

A. Yes sir.

Q. How many hours had you been out of a terminal at the time you met with this accident?

A. We left Bond at 9:25, and I believe that the accident was 11:40 or 11:50.

Q. You had been out of your terminal, then, about two hours?

A. About two hours, yes sir.

Q. Did you have your rest?

A. I had my full eight hours rest.

Q. You had your full eight hours rest?

A. Yes sir.

Q. That was at Bond?

A. Yes.

Q. What was the condition of your eyesight?

A. Good.

Q. What was the condition of your hearing?

A. Good.

[fol. 112] Were you in full possession of your faculties?

A. Yes sir.

By Mr. Van Cott:

Q. Have you lived, I will put it more specifically, have you lived in any places other than Grand Junction, Salida and Denver?

A. Well, not for any length of time, on visits, is all.

Q. The place where you have lived most of the time has been in Grand Junction; is that correct?

A. No, Salida; I was raised in Salida.

Q. You were raised in Salida?

A. Yes sir.

Q. Where is Salida as to Grand Junction? How far east of Grand Junction?

A. Two hundred and thirty-five miles.

Q. You also lived in Denver for a time, did you?

A. Yes sir.

Q. You lived in Grand Junction for a time?

A. Yes sir.

Q. Did you ever live in Utah?

A. No sir.

Q. Or in Salt Lake City?

A. No sir.

Q. Had you ever been to Salt Lake City before you came here to have your deposition taken?

A. No sir.

By Mr. Van Cott:

Q. Let me ask you this, this is from page 44. I will ask you if you remember testifying as follows, in answer to questions put to you by me at the taking of your deposition, on August 1st:

"Q. At that time that you stepped down, what was the condition of the weather?

"A. It was dark, very dark, black, I guess that is what you would say.

"Q. Wasn't storming?

"A. Just beginning to storm, to snow.

[fol. 113] "Q. Just beginning to snow?

"A. Yes sir.

"Q. Was there enough snow so that it interfered with your vision?

"A. No."

Do you remember giving that evidence?
A. Yes sir.
Q. That was true, wasn't it?
A. Yes sir.
Q. I will ask you if you also testified as follows—also from page 44:

"Q. Was there anything defective about the caboose, the handholds, anything like that?
"A. No.
"Q. Nothing at all?
"A. No. sir.
"Q. You didn't stumble on anything on the roadbed, did you?
"A. No sir; I didn't hit the roadbed; as I stepped down I stepped out into space, the edge of the bridge."

Do you remember giving that evidence?
A. Yes sir.
Q. That was true, was it?
A. Yes sir.
A. Would it be correct? When I said "the edge of the bridge", I didn't mean did I hit the edge of the bridge, I mean, as I stepped off into space, I was over the edge of the bridge, that is what I meant. I didn't mean I stumbled over the edge of the bridge, or hit the edge of the bridge.
Q. That is what it says, I don't construe it any different.
A. You asked me if I stumbled, or anything; isn't that correct?
Q. Yes; you said, "No sir".
A. I didn't hit the roadbed, or hit the side of the bridge.
Q. You remember giving that evidence?
A. Yes sir.
Q. And it was true?
A. Yes sir.
[fol. 114] Q. And you were in full possession of your faculties at the time this deposition was taken, weren't you?
A. Yes sir.
Q. You weren't suffering any mental disorder or pain, or anything of that sort?
A. No sir.

Q. You weren't confused?
A. No sir.
Q. What?
A. No sir.
Q. I will ask you if you testified as follows, page 4:

"Q. Do you remember swearing to the complaint in the case?
"A. Oh yes.

Q. His answer—the question was: "Do you remember taking this oath", and then I set forth the oath, and your answer "Yes sir".
A. Yes sir.

Q. "Q. You remember taking that oath?
"A. Yes sir.
"Q. Was that true?
"A. Yes sir.
"Q. Then you did read over the complaint, did you?
"A. Yes sir.
"Q. And you knew and understand the contents of the complaint?
"A. Yes sir.
"Q. Are the allegations in the complaint true?
"A. Yes sir.
"Q. All of them?
"A. Yes sir."

You remember giving that?
A. Yes sir.

By Mr. Van Cott:

Q. You remember giving it?
A. Yes sir.
Q. And it was true?
A. Yes sir.
Q. You had worked from about 1936 up to the time of this accident, east of Grand Junction?
[fol. 115] A. Yes sir.
Q. To Minturn, and Bond, with the exception of about six months, have you not?
A. Yes sir.
Q. And during that time you had gone over this bridge, I think you told me at the time of the taking of your deposition, approximately a thousand times?

A. Oh no, you better read that again.

Q. Very well. You deny that you so stated?

A. Oh, a thousand times, go ahead, no I don't deny that.

Q. You don't deny it?

A. Not a thousand times in the way you mean, up and down the trains. I have never counted them.

Q. I understand that.

A. Yes, sir, I——

Q. You testified——

A. Pardon me; that is all right.

Q. (Continued)—you had gone over that bridge, during that period, approximately a thousand times?

A. No set number of times.

Q. That was your evidence, approximately a thousand times?

A. I don't believe it is in there, a thousand times.

Q. I don't remember exactly. You remember— You say you went over about a hundred and forty-four times a year?

A. That's better.

Q. I will call your attention to this evidence, page 6—page 5:

"Q. Have you worked out of Grand Junction ever since 1936?

"A. Yes sir—"

By Mr. Van Cott:

Q. Now, I am calling attention to the evidence that you gave, that you had worked out of Grand Junction since 1936, except for six months, and now on page 6, following that evidence, I ask you if you testified as follows:

"Q. Have you worked steadily during that time?"

"A. Yes sir.

"Q. About how many trips a month do you make?

[fol. 116] "A. Well, let's see,—it is hard to say, It differs; when business picked up there were more trips.

"Q. Give us your best estimate of the average?

"A. Six round trips a half.

"Q. Six round trips a half month?

"A. Yes sir.

"Q. That would be twelve round trips a month, then?

"A. Yes.

"Q. Twelve round trips a month?
"A. Yes; could be better, I don't know."

Now, twelve round trips a month would mean in a year two hundred eighty-eight trips, wouldn't it?

A. Yes sir.

Q. Two hundred eighty-eight trips a year over that bridge, according to that estimate?

A. Yes sir.

Q. So the total number of trips in the years you say you worked would be well over a thousand, wouldn't it?

A. Yes sir.

Q. And would you say that you went over——

A. Pardon me, I wasn't objecting to your thousand, but your thousand statement was what I thought you said that I said I was over there for a thousand—stipulated that number. If I knew you was going to figure this all up I would have said, "Yes". I didn't get what you meant; I thought you meant that I said I was over there a thousand, that we had that number in there, that is what I was objecting to.

Q. Then you have gone over this disposition recently, have you not, Mr. Pauly?

A. Oh, yes.

Q. When?

A. Well, I went over it last night.

Q. And in whose presence?

A. No one's presence, my wife and I.

Q. Have you gone over it, prior to last night, recently?

A. Yes.

[fol. 117] Q. When?

A. I had the deposition in Grand Junction.

Q. You have studied this deposition very carefully, haven't you?

A. I have not, I have read it over.

Q. Would you say that you have gone over that bridge at Chacra about as many times during the daylight hours as during the dark hours of a day?

A. I can't say; I am not on regular schedule, my time varies.

Q. Wouldn't you say, finally, you have gone over it about the same number of times in daylight as in darkness, wouldn't you?

A. Well, I will admit to that, yes sir.

Q. You remember so testifying, don't you?
A. Yes sir.
Q. It was true, wasn't it?
A. Yes sir.
Q. And you remember testifying as follows, don't you, Page 8:

"Q. Then you had seen this bridge all of those times when you went over it by day time, hadn't you?
"A. Oh yes.
"Q. You had observed the fact there was no sidewalk or handrail on either the north or the south side of the tracks?
"A. Yes."

You remember so testifying?

A. Yes sir.
Q. How many times, Mr. Pauly, have you walked across that bridge prior to the time of this accident?
A. You mean for the whole length of my service from Grand Junction?
Q. Yes.
A. I imagine fifty times would cover it.
Q. And that was during the seven years preceding the accident, was it?
A. Yes.
Q. The bridge was always in that same condition?
A. Yes sir.
[fol. 118] Q. And you always walked across the foot path between the tracks, I take it?
A. You mean—yes sir, between the passing track and the main line track.
Q. Yes; you never tried to walk along the stringer?
A. No sir.
Q. What purposes did you have in walking across the bridge, in general?
A. In general, is mostly when you are—I will have to state it this way: When you are running a train sometimes they push you in the siding at Chacra, then the conductor, or possibly the rear brakeman—in other words, they had work to do at Funston—you understand what I mean. Then the conductor and the rear brakeman would talk over who would do the work at Funston, while you would be in the hole at Chacra, or in the siding. That is, you

would take the bills over, if you were going to set out cars at Funston, whatever you are going to do, you would walk over towards the head end, in order to expedite movement of the train, and then go over, do your work, instead of waiting till you got to Funston in order to do your work.

Q. And how many times would you say you have walked across the bridge in the night time?

A. I would say not over ten times.

Q. Not over ten times?

A. No sir.

Q. When you did, did you use your lantern to see, as you were going?

A. Yes; walked in between the tracks.

Q. What?

A. I took the path between the main line and the passing track.

Q. If you had descended from your train on the south side of the train, and east of the bridge, how would you have gotten across the bridge?

A. How would I have gotten across the bridge?

Q. Yes.

A. Why, I'd—well, I don't know what difference that would make. I would have climbed over the main line tracks, and went between the main line and passing track. [fol. 119] Q. Did you think you were east of the bridge when you got off the caboose?

A. No sir.

Q. Think you were west of it?

A. Yes sir.

Q. Did you say to Mr. Ventura that you thought you were west of "the darn bridge"; something to that effect?

A. I can't recall, I might have made that statement, I can't recall right now.

Q. Then you were thinking about whether you were on the bridge, or east of the bridge or west of the bridge; is that right?

A. I thought that I was west of the bridge, yes sir.

Q. How far west of the bridge did you think you were?

A. Well, I don't know.

Q. Did you think you were a short distance west, or a long distance west?

A. A long distance.

Q. A long distance?

A. I don't know exactly the distance.

Q. What do you mean by "a long distance," in giving that answer?

A. Oh, three or four cars.

Q. And when did you do that thinking about whether you were on the bridge, or west of the bridge, Mr. Pauly?

A. Well, I don't get what you are driving at.

Q. At what time with reference to the time you stepped off the caboose, did you do that thinking about where you were?

A. Well, Ventura said that I said that at the bottom of the—after I had fell.

Q. I am not talking about what Ventura—I am not talking about what Ventura said.

A. Ventura said—you made the statement that Ventura said that I thought I was "west of the darn bridge."

Q. Yes, that is true, but you also testified that you thought you were west of the bridge, and I am addressing myself to that.

[fol. 120] A. Well, I am directing my statement to what Ventura said.

Mr. Van Cott: The question was, when did he do his thinking about being west of the bridge, with reference to the time he stepped off the west end of the caboose.

A. After my accident.

Q. Pardon?

A. After my accident.

Q. Oh, you didn't think about it before the accident?

A. Whether I was west, or——

Q. Yes.

A. I knew—I don't know what you are trying to do—I knew the bridge was there all the time, sure.

Q. You knew the bridge was there all the time, and you thought you were west of it?

A. Yes sir.

Q. And you did that thinking before you stepped off, did you?

A. I have been——

Q. I will get at it another way. You have testified that you told Ventura—when he came down to you in the creek-bed,—that you thought you had passed the "darn bridge"? Didn't you so testify?

A. No, I don't remember of making that statement, now.

Q. Did you say to Ventura, in substance and effect, at

the time he came down into the creekbed, that you thought you had passed "the darn bridge"?

A. I can't remember, now.

Q. Did you say anything like that?

A. I don't remember, now.

Q Do you deny that you said it?

A. I don't know whether I denied it or not, I don't know whether I would, or not, I was in pain then.

Q. Do you remember testifying, a few minutes ago, that you did think you were west of the bridge?

A. Yes.

Q. Now, when did you think that, before you stepped off the caboose or afterwards?

[fol. 121] A. Well, must have been before.

Q. Yes.

A. All right.

Q. Was it before?

A. What I am trying—when you are railroading, you know a certain thing is there, the thought doesn't come into your mind right at that particular moment. I thought that I was west of the bridge, yes.

Q. When did you think it?

A. Pulling into Chacra.

Q. Pulling into Chacra, you knew you were east of the bridge when you were pulling into Chacra, didn't you?

A. All right, sure.

Q. All right, then, you thought the caboose had gone over the bridge, did you?

A. Yes.

Q. When did you think that with reference to the time that you got off the caboose?

A. Well, Jimminey Christmas, I don't know.

Q. Well, you have said you knew it was before, that it was before you got off the caboose.

A. You don't think of those things before you get off the caboose; my idea was to get over to that car in order to expedite the movement of the train, in order to get to it; I can't tell you the moment I thought I was either east or west of the bridge, I thought I was west when I got off to go over to the car.

Q. Were you in the caboose when you thought that? Will you answer the question?

A. I am thinking just a moment, Mr. Van Cott, please.

Q. Yes, certainly.

A. I was in the caboose.

Q. Then you do remember?

A. Yes.

Q. And what part of the caboose were you in?

A. West end.

[fol. 122] Q. West end?

A. Yes sir.

Q. But not on the platform?

A. No sir.

Q. And how long before you stepped off the west steps did you think that? If you can't answer, you can say so?

A. I can't answer it.

Q. You can't answer it?

A. No; you are trying to get me down to a certain time I thought of it; I can't state.

Q. State approximately.

A. I told you, pulling into Chacra.

Q. But, Mr. Pauly, when you say "pulling into Chacra", do you mean the caboose pulling into Chacra, or the engine pulling into Chacra?

A. After we passed east switch at Chacra, when the caboose passed the east switch at Chacra, it pulled to a stop.

Q. You knew the bridge was east of Chacra, at that time?

A. Sure, but we weren't stopped, we were still moving.

Q. Later on, you thought the caboose had passed the bridge?

A. Absolutely, yes.

Q. Then it wasn't when the caboose was pulling into the east switch?

Mr. Black: That isn't what he said.

A. I am trying to give you the best answer; I told you when pulling into the bridge at Chacra, we were still moving.

Q. At the time you had passed the east switch, you were still moving, you did still have this bridge in mind; is that correct?

A. I knew the bridge was there, I didn't have the bridge in my mind, no.

Q. Did you at any time?

A. No, we were still moving, as I am trying to tell you, as I knew the bridge was there, but the fact that the bridge wasn't in my mind at that instant.

Q After your train came to a stop, did you have the bridge in mind?

[fol. 123] A. No, I thought we were past the bridge.

Q. You thought you were past the bridge?

A. Yes sir.

Q. And you thought that after the train came to a stop; is that correct?

A. That is correct.

Q. When you were in the caboose?

A. Yes sir, that's correct.

Q. Have you ever noticed, Mr. Pauly, the different sounds made by a train as it passes over a track?

A. Yes sir.

Q. For example, the noise that a train makes when it is going along a fill, as compared with the noise it makes when it is going through a cut?

A. Yes sir.

Q. And there is a difference, is there?

A. Yes sir.

Q. Can you describe, in a general way, to the jury, what the difference is?

A. Well, in the new style caboose, I don't know the difference; sounds are different than in the old wooden ones.

Q. I am not referring to a caboose, particularly, I am referring to an entire train, on any part of the train, including the engine?

A. There are different sounds; I wouldn't know how to describe it.

Q. Have you noticed a different sound, as a train passes a building?

A. Well, yes.

Q. Or even a telegraph pole?

A. I don't know the difference.

Q. Or cars on sidings?

A. Yes sir.

Q. There is a difference, is there?

[fol. 124] A. Why, sure.

Q. To that sound there?

A. Sure.

Q. And when it crosses a bridge, have you noticed a different noise made by a train, crossing a bridge?

A. Oh, yes.

Q. Is that quite distinctive?

A. Yes.
Q. Particularly a wooden bridge?
A. Yes sir.
Q. Kind of a hollow sound, isn't it, to that?
A. Kind of a rumbling, yes.
Q. Rumbling, and there is also some vibration, isn't there?
A. Not any more.
Q. Did you notice that sound, that typical sound, made by a train passing over a bridge, when No. 20 went past you that night?
A. No. 20 wasn't there, No. 20 was passing the caboose at that time.
Q. That is what I am asking you, your caboose was stopped at that time, wasn't it?
A. Oh, yes.
Q. At the time No. 20 passed, your caboose was stopped?
A. Yes.
Q. And did you notice the noise made by No. 20, at that time?
A. Oh, yes.
Q. It was—what kind of a noise was it?
A. The engine was puffing.
Q. But, with reference to the hollow sound made by a train going over a bridge?
A. Oh, No. 20 wasn't past me, that is what I am trying to tell you.
Q. Pardon me.
A. No. 20 hadn't got by, No. 20 was right at the caboose, making that puffing noise.
[fol. 125] Q. The caboose was on the bridge, wasn't it?
A. Oh yes.
Q. And had come to a stop at the time that No. 20 passed?
A. Yes, but you can't distinguish between two different sounds when the engine is puffing right by the caboose, there.
Q. Then you didn't notice the sound made by it, the engine going over the bridge?
A. No, that is correct.
Q. After the engine passed, did you notice the sound of the cars going over the bridge?
A. No sir.

Q. You didn't notice that?

A. No sir; in fact, there isn't much sound over those bridges any more, because they are slag. They have got black slag on them, same as the roadbed, and they do not carry much sound.

Q. Did you know, Mr. Pauly, the time that you reached Chacra?

A. How is that again, Mr. Van Cott?

Q. Did you know at the time that you reached the Chacra east switch?

A. Did I know?

Q. Yes.

A. Yes sir.

Q. Did you know where you were as you came down the track from Funston towards Chacra?

A. Yes sir.

Q. How did you know?

A. By the lapse of time between Chacra, and the speed of the train, and also looking for that certain high-balling spot that we give to the head end that all is well in the rear.

Q. How were you able to see when you reached that point, that high-balling spot?

A. The engine going around the curve.

Q. Did you also know where you were because you could see the creek and the mountains on both sides of you?

A. Well, I—you can't see them. They were a black silhouette, they were dark.

[fol. 126] Q. Pardon me?

A. They were dim, black, a black silhouette.

Q. But you could see them, couldn't you?

A. I don't know what you mean; I know I knew the mountains were there, a black silhouette.

Q. Don't you remember testifying in your deposition that you could see them?

A. Sure.

Q. And that was true, wasn't it?

A. Yes.

Q. Do you remember testifying on your deposition—I withdraw that. Do you remember, after you put out the red fusee on the left-hand side of your caboose, that you saw an answering signal from the head end of the train?

A. I don't believe I said that, no.

Q. I didn't ask you if you said it; I asked you if you did see it.

A. I didn't see any answering ahead like my rear brakeman said he caught it.

Q. Don't you remember at the time I took your deposition you were uncertain whether you saw it or whether Ventura saw it?

A. That is correct, that is the point I am getting at.

Q. So you may have seen it?

A. I may have.

Q. That light would be eighty-six cars away, would it?

A. Yes sir.

Q. Do you remember whether you went to the rear end of the caboose, after your caboose came to a stop?

A. No sir.

Q. You don't remember?

A. I didn't go to the rear end.

Q. You didn't go to the rear end?

A. No sir.

Q. You are positive?

A. After my caboose was stopped?

Q. Yes.

[fol. 127] A. No sir.

Q. Did you, just before your caboose was stopped?

A. I was on the rear end before my caboose was stopped, yes, sir.

Q. And how long before your caboose was stopped were you on the rear end?

A. Coming over the east switch.

Q. Coming over the east switch?

A. That is correct, my hind brakeman and I were both on the rear platform coming over Chacra.

Q. How long did you stay?

A. Not very long.

Q. Yes. Mr. Pauly, you are the only one that was there. I am trying to find out what you mean by "not very long."

A. Why, after I caught the reflection of the headlight down the passing track.

Q. How long would you say it was, then, that you stayed out there?

A. Well, not any length of time, not any more than glance out and catch the reflection of that light, then go inside.

By Mr. Van Cott:

Q. Can you now enlighten us as to what you mean by "not very long"?

A. I can't make any definite time.

Q. Would you say that it was two minutes?

A. No sir.

Q. One minute?

A. Well, I have never timed myself. I understand what you are trying to get, the period of time, and I am trying to give you the length of time. I don't know how long it would take you to glance out and catch the reflection, I will make it a few seconds.

Q. That is all you did on the rear platform?

A. That is correct.

Q. You saw that headlight, then went in; is that the way you testify?

A. Yes sir.

Q. How far was the headlight away from you at the time you thus saw it?

A. Well, coming down the pass.

[fol. 128] Q. How far away?

A. Oh, gosh, I don't know how to answer it.

Q. Well, hundreds of feet or hundreds of yards, or a quarter of a mile, or half a mile, whatever you want to use; you are the one that saw it, Mr. Pauly; you know it wasn't right on you, don't you?

A. That's right.

Q. Then how far back was it?

A. Thirty car-lengths away.

Q. Thirty car-lengths away?

A. Thirty, yes; you understand that isn't definite now.

Q. Now, I understand that, but that is your best judgment. Did you stay out on the back platform and check it as it went by?

A. No sir.

Q. That is one of your duties as trainman, isn't it, to check other trains that go by you, isn't it?

A. That's correct.

Q. I call your attention to Rule 810, of Rules and Regutions of the Operating Department, 1938. You are familiar with that, aren't you?

A. I believe so.

Q. Will you look at it—(Mr. Van Cott hands something to the witness).

A. Yes sir.

Mr. Van Cott: I will read it into the record rather than offer the book, if the court please.

The Court: All right.

Mr. Van Cott: "In order to promote safe operation of the trains, it is the duty of trainmen, section men and bridge men, station employees, pumpers, and all others whose duties will permit, to place themselves in a position to discover any unusual or unsafe condition about passing trains, and give suitable signal to trainmen or enginemen, who must be in position to receive and act upon such signal."

You were familiar with that rule on the night in question, weren't you?

[fol. 129] A. Yes sir.

Q. Where did you fulfill your duty with respect to checking Train No. 20?

A. On the west platform.

Q. On the west platform; and not on the east platform?

A. That's correct.

Q. You remember testifying, at the time that I took your deposition, that you did that on the east platform, don't you?

A. I don't remember; you better check page 33 before you go back to 46 or 44.

Q. Why did you make that statement, Mr. Pauly?

A. Because I went over my deposition last night with my wife, wih reference to my statements made in my deposition.

Q. I will ask you if you testified as follows at the taking of your deposition on August 1st—I am reading from page 36:

> "Q.", now, I have got to read two or three questions back in order to bring in the context here, if the court please.

The Court: All right.

Q. Page 35:——

A. I believe you will—Mr. Van Cott, I believe you will have to go back to 33.

Q. "Q"—page 35—"Did you take the number of this engine as it passed you?"

A. Yes sir.

Q. No, I am reading——

A. Oh, pardon me.

Q. "Q. Did you take the number of this engine as it passed you?

"A. I didn't have time to put it in my book; I checked the number, and the time of the train passing."

I am asking you if you so testified, since you understand the question.

A. Yes.

"Q. What number was it?

"A. 802, if I remember correctly.

"Q. Where did you see that number?

"A. From the caboose platform.

"Q. I mean, where was the number, on the side of the engine?

[fol. 130] "A. Yes, on the side, and they have a number on the headlight.

"Q. Where did you see it?

"A. Number on the headlight.

"Q. On the headlight?

"A. Yes.

"Q. You say you were on the caboose platform; were you moving?

"A. No, we were stopped.

"Q. How far was the headlight from you when you saw the number?

"A. Just like passing—the engine was passing the caboose.

"Q. And the caboose was then stopped; is that correct?

"A. Yes.

"Q. How long had the caboose been stopped at that time?

"A. Just pulling to a stop; just pulling to a stop, then the train was pulling by; I checked to see what the train was.

"Q. The caboose was just pulling to a stop when you checked this number on this engine?

"A. Yes sir, that's right.

"Q. How far did the caboose go after that?

"A. We were stopped.

"Q. I thought you said were pulling to a stop.

"A. We just stopped, just pulling down to a stop, yes.

"Q. Were you still moving?

"A. No, not the way you say—the train was stopping—we were stopped, yes, we will say we were stopped.

"Q. I am not trying to get you to say one way or the other; I am trying to get your recollection. You say you were moving to a stop; does that mean you were stopped or still moving?

"A. I don't know how to state it; I imagine you would say we were just pulling to a stop; you couldn't say it was a movement, just stopping.

"Q. Just that final lurch, you mean, the equipment gives as it stops?

"A. Yes."

Do you remember so testifying?

A. Yes.

Q. That was true, was it?

[fol. 131] A. Yes sir.

Q. Do you remember testifying as follows:

"Q. At that time you were on the head end of the caboose, were you?"

No,

Q. "Q. At that time you were on the head end of the caboose, is that right?

"A. When I checked the train I was on the rear end."

Do you remember so testifying?

A. Yes sir.

Q. Was it true?

A. Yes. Also made——

Q. Just answer the question, will you?

A. It wasn't——

Q. It wasn't true?

A. That's correct.

Q. Why did you so testify, if it wasn't true?

A. I testified, on page 33, where I was. You are just trying——

Mr. Van Cott: If the court please, I move to strike the witness' answer. That can be brought out.

The Court: Yes, the answer may be stricken.

Q. The question is, Mr. Pauly, if that is not true, why did you so testify?

A. I thought that you—I can't remember all the things that I said.

Q. I call your attention to the fact that you corrected me in that answer——

A. Oh no.

Q. I call your attention to the question again:

"Q. At that time you were on the head end of the caboose, is that right?"

A. Yes sir.

Q. "A. When I checked the train I was on the rear end."

You notice that?

A. Sure, there were two different statements there.

Q. You notice I asked you if you were on the head end; [fol. 132] you answered no, you were on the rear end; did you notice that?

A. No, I didn't notice that.

Q. Look at it.

A. Sure, I believe it is there; it is there, sure, I know what it says.

Q. You notice then that I asked the question:

"At that time you were on the head end of the caboose, is that right?"

And your answer:

"When I checked the train I was on the rear end."

You notice that?

A. Yes sir.

Q. Why did you so testify, if it wasn't true?

A. Well, going back in the deposition, I testified that I was on the head end, and when you—I don't know why.

Q. You don't know why?

A. No.

Q. I will call your attention to the next question and answer, and ask you if you so testified:

"Q. When you checked the train you were on the rear end?

"A. That's right."

A. Yes sir.

Q. "When I said to the brakeman, 'I will go over and check that car while we are meeting another train.' Evidently I knew they had our signal, they were going to stop there."

Do you remember so testifying?

A. Yes sir.

Q. Was it true?

A. To that testimony, yes sir.

Q. That was true, was it?

Q. Mr. Pauly, I desire to call to your attention the last answer that you gave me, and ask you whether you intended the answer. I asked you this question, reading from Page 36, did you testify as follows:

"Q. When you checked the train, you were on the rear end?

"A. That's right. When I said to the brakeman, 'I will go over and check that car while we are meeting [fol. 133] another train.' Evidently I knew they had our signal, they were going to stop there."

By Mr. Van Cott:

Q. Mr. Pauly, will you state whether or not you testified at the taking of your deposition, as follows:

"Q. When you checked the train, you were on the rear end?

"A. That's right. When I said to the brakeman, 'I will go over and check that car while we are meeting another train.' Evidently I knew they had our signal, they were going to stop there."

Did you so testify?

A. Yes sir.

Q. Was that true?

A. Yes sir.

Q. I call your attention, in giving your answer that that was true, to the fact that the answers contains three different sentences. Will you please look at it.

A. Yes sir.

Q. And you say that all three of those sentences in the answer were true?

A. Well, I tell you they were true, I made a lot of statements, particularly to this accident at the time it happened, that wasn't on the mind, mind, at the time the deposition was taken; that was the reason I went over with my wife last night, to get that in mind.

Q. Mr. Pauly, you may intend that to be an answer to my question, but it isn't an answer to my question.

A. Yes.

The Court: Did you understand the question, Mr. Pauly? Would you like to have it read?

A. He wants to know if I said that, at the time the testimony was taken, that answer was true.

The Court: He has already asked you if you did so testify in those three sentences in that answer, and you said, "Yes." Now, Mr. Van Cott asks you, "Are all three of those sentences true, or were they true, when you so testified." You understand that?

A. Yes sir.

[fol. 134] Mr. Van Cott: I want to be entirely fair about it, because I am now going to call the witness' attention to the fact that his answer to the second question, his answer to that question is exactly opposite to his answer to the preceding question.

By Mr. Van Cott:

Q. I am going to call your attention once more now, Mr. Pauly, and so that you may understand the question both by seeing it and also hearing it, I am going to call your attention to the preceding question. I am reading now from page 36:

"Q. At that time you were on the head end of the caboose, is that right?

"A. When I checked the train I was on the rear end."

Now, did you so testify at the time I took your deposition?

A. Did I testify to that?

Q. Yes; that I just read.

A. Yes.

Q. Was it true?

A. At that time, I have made a lot of the particulars, there is a lot of particulars I wanted to go over. I know I made a lot of statements in that deposition that are not true, as far as I can understand them to be, because the particulars of the case weren't in my mind.

Q. Didn't you think they were true at the time you gave your testimony?

A. At that particular time, yes.

Q. You did think that they were true at that time, did you?

A. Yes.

Q. What has happened to change your mind as to what you thought was true?

A. I wanted to be sure; I have been thinking about that, to go over in my own mind to see what I said and whether they were so.

Q. Weren't you also, at the time you testified, under oath, when your deposition was taken——

A. There were a lot of particulars about the fine points about it, my mind wasn't on when I was asked those questions.

Q. Now, I am going to come back to specific questions I asked you: Calling your attention to this question and answer that I just read to you?

[fol. 135] "Q. At that time you were on the head end of the caboose, is that right?

"A. When I checked the train I was on the rear end."

You so testified, did you not?

A. Yes sir.

Q. Was it true?

A. Yes sir.

Q. I call your attention to this further question and answer, and ask you if you so testified:

"Q." —this right after those two questions—"You were on the rear platform?

"A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat."

Did you so testify?

A. Yes sir.

Q. Was it true?

A. Yes sir.

Q. I call your attention to the next question and answer:

"Q. That all happened after you checked the train?

"A. That is, my going through the caboose to get my coat, yes.

"Q. Putting on your overcoat?

"A. Yes. I had no reason to have it on—still in the cupola. As I started to get down with it, this train came through the passing track, so I stepped to the rear platform to check it, and told my rear brakeman to take care of the hind end, 'I will check this car now'."

Now did you so testify?

A. Yes sir.

Q. Was it true?

A. There is a lot of particulars about it that come to my mind when I made that statement that are not true now.

Q. Something that was true then is not true now?

Q. Will you tell the jury something was true on August 1st, and it isn't true now?

A. No, sir; I mean——

[fol. 136] Q. What do you mean?

A. I mean the particulars in my case weren't settled in my mind; I hadn't gone over anything at that time, at the time I came over for the deposition.

A. And last evening, when I took the deposition to study it over, there were a lot of particulars concerning my case that come back to my mind, a clearer view to some of the former statements I made might conflict with what I have said.

Mr. Van Cott:

Q. Now, I asked you the question—I read you three questions, or two questions and two answers, and asked you the question whether you did so testify, and you stated "Yes."

A. Yes.

Q. I then asked you if they were true, and I think I didn't have an answer to that question. Do you remember the questions and answers that I read to you?

A. Yes sir.

Q. You did so testify, didn't you?

A. Yes.

Q. Were they true, was that true that you testified to?

A. It was true except for—at that particular time that the deposition was taken, I thought they were true, yes.

Q. But now you think they were not true?

A. Since going over my own deposition, and what I have said——

A. I have got the train of thought now.

Mr. Van Cott:

Q. The question was whether you now thought that they were not true; your answers were not true?

A. No.

Q. You think they were not true?

A. They were not true now?

Q. Is that what you are saying?

A. No, I haven't said anything, I am trying to get clear in my mind what you mean and what I mean. I don't say that I lied, that that isn't true what I said, no. No, what I want to do——

Mr. Van Cott: I don't know whether the record is clear, your Honor. I can go back and read those two questions and answers, but I think the witness is confused, and I [fol. 137] would rather do that than have any confusion.

The Court: Go ahead.

Q. Now, listen, Mr. Pauly, if you will, please. Did you testify as follows:

"Q. You were on the rear platform?

"A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat."

A. Yes sir.

Q. Did you so testify?

A. Yes sir.

Q. Was it true?

A. Yes sir.
Q. Did you testify as follows:

"Q. That all happened after you checked the train?
"A. That is, my going through the caboose to get my coat", did you answer: "Yes."

A. Yes sir.
Q. Did you so testify?
A. Yes sir.
Q. Was it true?
A. Yes sir.
Q. Did you testify as follows:

"Q. Putting on your overcoat?
"A. Yes; I had no reason to have it on—still in the cupola; as I started to get down with it, this train came through the passing track, so I stepped to the rear platform to check it, and told my rear brakeman to take care of the hind end, 'I will check this car now'."

Did you so testify?
A. I so testified.
Q. And was it true?
A. It is not.
Q. Did you think it was true at the time you so testified?
A. Yes.
Q. Which part of that answer do you now say was untrue?
[fol. 138] A. Oh, I stepped to the rear platform to check the train.
Q. You say that wasn't true?
A. That's right.
Q. All right. I will ask you if you testified as follows:

"Q. When you say it was Engine 802, did you then know it was Train No. 20?
"A. Yes."

Did you so testify?
A. Yes sir.
Q. And was it true?
A. Yes sir.
Q. Did you testify as follows:

"Q. Why?
"A. I checked the passenger equipment, too; that is the usual passenger engine."

Did you so testify?
A. Yes sir.
Q. Was it true?
A. Yes sir.

"Q. Did you check the passenger equipment?
"A. That's right."

Did you so testify?
A. Yes sir.
Q. Was that true?
Q. Did you testify as follows:
A. Yes sir.

"Q. As it went by you?
"A. Yes, that's right."

A. Yes sir.
Q. Did you so testify?
A. Yes sir.
Q. And was that true?
A. Yes sir.
Q. Did you testify as follows:

"Q. When you were on the back platform?
"A. Yes."

Did you so testify?
[fol. 139] A. I testified that way, yes.
Q. Was it true?
A. No, I couldn't—let me call your attention——
Q. Did you think it was true at the time you so testified?
A. Yes sir.
Q. What has happened since to cause you to change your testimony?
A. I couldn't be on the hind end; if you go back and start—I don't know——
Q. "Q. What did the"—Did you testify as follows:

"Q. What did the equipment consist of?
"A. Baggage car, mail, car, day coach and sleeper; four cars."

Did you so testify?
A. Yes sir.
Q. Was that true?

A. Yes sir.

Q. Did you testify as follows:

"Q. Then after the train passed you going east, you went back in the caboose and put on your overcoat, and then went to the head end of the caboose; is that correct.

"A. That is correct."

Did you so testify?

A. I testified——

Q. Was that correct?

A. No sir.

Q. Did you think it was correct, when you so testified?

A. Yes sir.

Q. Did you testify as follows:

"Q. Was there any other equipment in the passing track after Train 20 passed you?

"A. No, not right exactly then, no."

Did you so testify?

A. Yes sir.

Q. Was it true?

A. I don't know.

Q. Did you think it was true at the time you testified?

A. I was injured, then, I don't know what happened after "20" went by.

[fol. 140] Q. Well, Mr. Pauly——

A. Yes, Mr. Van Cott.

Q. —No. 20, your testimony yesterday was that the engine of No. 20 went by you when you were on the west end of the caboose?

A. That is right.

Q. And it only consisted of engine and four cars, didn't it?

A. Yes.

Q. Are you telling the jury now that that train hadn't passed before you fell off or stepped off?

A. Well, it was what you——

I don't understand what you mean by "passing equipment," I am answering about the passing equipment, it couldn't have happened because after "20" went by, I didn't know whether more trains came through there.

Q. All right; did you testify as follows:

"Q. Was there at any time that you saw?
"A. No."

Did you so testify?
A. Yes, sir.
Q. Was that correct?
A. Yes, sir.
Q. Did you testify as follows:

"Q. You know some equipment came along after the accident?
"A. Yes."

Did you so testify?
A. Yes, sir.
Q. Was it true?
A. Yes, sir.
Q. "Question," did you testify as follows:

"Q. But there was nothing on the passing track after '20' went east?
"A. No."

Did you so testify?
A. Yes, sir.
Q. Was it true?
A. I am getting in the accident; that already happened, I don't know.
[fol. 141] Q. You don't know?
A. As far as my answer is concerned, I didn't know.
Q. Mr. Pauly, you testified yesterday afternoon that promotion depends on ability. Now, isn't it a fact that part of that ability depends upon the compliance with rules?
A. Yes, sir.
Q. You have copies of these rule books, do you not?
A. Yes, sir.
Q. The Rules and Regulations of the Operating Department, 1938, and the Safety Rules of 1937?
A. Yes, sir.
Q. You have those in your possession at all times as a conductor or brakeman, don't you?
A. Yes, sir.
Q. And you signed a receipt for them?
A. Yes, sir.

Q. And you were examined in regard to them?

A. Yes, sir.

Q. And passed the examination?

A. Yes, sir.

Q. You are thoroughly conversant with them, aren't you?

A. Yes, sir.

Q. I call to your attention Rule 3 of the Safety Rules, reading as follows: "3, Before getting on or off equipment, employees must look out for safe footing, obstructions, or equipment moving on other tracks. When practicable, they must board or alight from rear of car or engine."

You were familiar with that rule at and before the happening of this accident, weren't you?

A. I have read them, yes.

Q. You were——

A. That's no set rule.

Q. Do you mean to say that isn't in the Safety Rules?

A. That is in the Safety Rules, and you are supposed to observe them, yes, but you don't have those in your mind all the time.

Q. Well——

A. You observe to take the safe course, the first rule is [folio. 142] the safety first.

Q. All right.

A. All right.

Q. But you did know this rule?

A. You take your examination on the Rule Book, the Book of Rules, you take your examination.

Q. I call your attention to the part of that rule which reads, "When practicable, they must board or alight from rear of car or engine."

A. Yes, sir.

Q. You know the purpose of that rule, do you not?

A. Yes.

Q. What is it?

A. Not to stumble in between cars; get off at the hind end, why, you are out of the way of moving equipment.

Q. Now, if you had followed that rule the night of this accident, you wouldn't have been injured, would you?

A. I don't know whether I would or not; caboose was on the bridge.

Q. You know—you heard the evidence here of Mr. Ventura and also Mr. Linkins in regard to where the rear end of that caboose is; wasn't it——

Q. You did hear the testimony, didn't you?

A. Yes, sir.

Q. Now, if you had stepped off the rear end of that caboose, as required by the rule, you would not have been injured that night, would you?

A. I don't know.

Q. Calling your attention to the evidence, then, to Mr. Linkins' that the east end of the caboose was two feet east of the bridge, of the east end of the bridge, if you had stepped off the rear step, as required by that rule, you wouldn't have been injured, would you?

A. I don't know, in those steel cabooses, the coupler projects out. Now, I don't know whether Mr. Linkins meant the coupler was two feet off the bridge or trucks two feet off the bridge, because steps——

Q. Either way, you wouldn't have been injured, would you, Mr. Pauly?

A. That is pretty close distance, two feet.

[fol. 143] Q. Now, calling your attention to Mr. Ventura's evidence that the east end of the caboose was about, I think, two or three feet onto the bridge, and that the distance from the lower caboose step to the ground beneath was three, four, or five feet, if you had stepped off the rear end and with the caboose in that position, you wouldn't have been injured, would you?

A. I might.

Q. By going down five feet?

A. I don't know.

Mr. Black: He says, "Yes," he would have been injured.

A. Why, sure.

Q. Now I call your attention to Rule B of the Safety Rules —oh, before I do that—I offer in evidence Rule 3 that I read into the record a few moments ago.

The Court: It may be received.

Q. I call your attention to Rule B of the Safety Rules reading as follows: "Safety must be the first consideration in every department of the service. In all cases, the safest available methods must be followed; in case of doubt or uncertainty, the safe course must be followed."

A. Correct.

Q. You had that rule in mind at the time this accident happened did you?

A. I didn't have any rule in my mind. I work by the rules, the safe course to pursue, yes.

Q. You knew the rule, didn't you?

A. Yes.

Mr. Van Cott: I offer in evidence, if the Court please, Rule B as I have just stated.

Mr. Black: No objection.

The Court: It may be received.

Q. I call your attention to Rule D of the Safety Rules reading as follows: "An employee who is careless of his own safety or that of others will not be allowed to remain in the service; employees must not rely upon the carefulness of others; but must protect themselves when their own safety is involved." You were familiar with that rule, weren't you?

[fol. 144] A. Yes.

Mr. Van Cott: I offer that rule in evidence.

Mr. Black: No objection.

The Court: It may be received.

Q. Calling your attention once more to Rule 3, the first part reading: "Before getting on or off equipment, employees must look out for safe footing, obstructions, or equipment moving on other tracks."

A. Yes, sir.

Q. Of course, you have always had that in mind that you must always look for safe footing, haven't you, Mr. Pauly?

A. That you must always look for safe footing?

Q. Yes, when getting off of equipment?

A. That—of course when working, you naturally form habits, yes.

Q. It is more than a habit; it is necessary, isn't it?

A. Well, it is necessary to look for a firm footing, yes.

Q. It is required by the rule you know that?

A. Safe course is the rule, to pursue the Safety Rules, as I say, you are not examined on the safety rules.

Q. I am asking you about that rule which you have already told the jury you know about.

A. Yes.

Q. Yes, and to the part of it——

A. Yes, yes, I answered, "yes."

Q. All right, now it is necessary for you in getting on or off equipment to look for a safe footing, isn't it?

A. I believe we answered that.

Q. Both as required by the rule and as required by your own safety; isn't that true?

A. Yes.

Q. Now, there are many, many places on a railroad where if you didn't look for a safe footing before you alighted from equipment, you would be seriously injured, aren't there?

A. Yes.

Q. For example, between stations, there are many places between Dotsero and Chacra in Glenwood Canyon, for example, where if you didn't look you would go clear down the side of the canyon, isn't that true?

[fol. 145] A. Yes, sir.

Q. Haven't you made a practice of—through your railroad experience, to look before you stepped down from equipment?

A. Yes, sir.

Q. And you testified, I think, yesterday that you so looked on this occasion; that you did look before you stepped down?

A. Yes sir.

Q. I will ask you if you testified as follows at the time I took your deposition; reading from Page 42:

> "Q. At the time you stepped down from the caboose, you had the lantern lighted and the fusee lighted, is that correct?
>
> "A. When I stepped out the door, I cracked the fusee and had them in my hand as I stepped down."

Did you so testify?

A. Yes, sir.

Q. Was that correct?

A. Yes, sir.

Q. Did you testify as follows:

> "Q. Did you look down there before you stepped?
>
> "A. No, it was all black to me as if I was on the main line is all on the side of the track."

Did you so testify?

A. I so testified, but if it appeared all black to me as that statement says, I must have looked, didn't I?

Q. Was that answer true?

A. That I made that—yes, yes.
Q. Did you testify as follows:

"Q. You didn't look before you stepped down?
"A. No, my idea was I was going to go down to the car and look at it as fast as I could while we were still stopped. I picked up the fusee, took my lantern, cracked the fusee, and stepped right off."

Did you so testify?
A. Yes, sir.
Q. Was that true?
A. Yes, sir.
[fol. 146] Q. "Question," did you testify:

"Q. Did you turn your lantern, the light of it, down below where you were going to step, before you stepped down?
"A. I had it lit; I didn't turn it downwardly; I would have the light in my hand; as I cracked the fusee I had it in my hand; I had this hand on the hand rail of the caboose on this side; as I stepped down this hand would be here, the light would be here; as I stepped down, you would figure you was on the ground ready to move."

Did you so testify?
A. Yes sir.
Q. Was it true?
A. Yes, sir.
Q. Did you testify as follows:

"Q. You didn't look down?
"A. No, you are standing on the end of the caboose like this, you crack the fusee, the lantern in your hand."

Did you so testify?
A. Yes, sir.
Q. Was it true?
A. Yes, sir.
Q. Did you testify as follows?

"Q. In which hand?
"A. This hand.
"Q. That is the left hand?
"A. The left hand; the fusee in the same hand; as I stepped down, I had this hand, the right hand, on the

hand rail on the west side of the caboose swinging out to go over like you swing out to go over to look."

Did you so testify?
A. Yes sir.
Q. Was it true?
A. Yes sir.

Q. "Q. You were facing the caboose then?
"A. I was facing the train.
"Q. I mean facing the train.
"A. Yes sir."

[fol. 147] Did you so testify?
A. Yes, sir.
Q. Was it true?
A. Yes, sir.
Q. "Question," did you testify as follows:

"Q. With your back away from the train?
"A. With my back away from the train, with my back to the caboose.
"Q. You just stepped down?
"A. I just stepped down."

A. Yes, sir.
Q. Did you so testify?
A. Yes, sir.
Q. Was it true?
A. Yes, sir.
Q. "Question," did you testify as follows:

"Q. Without looking?
"A. Yes, figuring that was the ground."

Did you so testify?
A. Yes, sir.
Q. Was that true?
A. Yes, sir.

Mr. Van Cott: That's all.

Redirect examination.

By Mr. Black:

Q. Mr. Pauly, I show you the lantern that was exhibited to you by Mr. Van Cott this morning, and direct your attention again to the fact that there are two lights at the

bottom, the "spot light," and a "spray light," as you call it. Now, it is true, is it not, that the spot light, as you said, was used to see the numbers on the sides of cars as they passed?

A. Yes, sir.

Q. And you use it for that purpose only?

A. That was——

Q. The other light is a spray light?

A. Yes, sir.

Q. And that is the light, as I understood your testimony, [fol. 148] that you use in giving signals to other members of the train crew?

A. Yes, sir, either light you can use.

Q. Which one do you ordinarily use in giving signals?

A. The spray.

Q. You use the spray. As you dismounted from the caboose at the time you were injured, which of these lights did you have on, the spray or the spot?

A. The spray.

Q. You had the spray?

A. Yes, sir.

Q. Now, I believe you stated here today that you had the spray light in the left hand?

A. Yes, sir.

Q. Immediately before you dismounted, you said you cracked the fusee; I want you to take the lantern and show the jury just what you meant by "cracking the fusee." Don't want you to crack it, but just show them what you did and how you did it.

A. Right here; well, I had to get my light on this way and my right hand like that, had the fusee like that, just reached this up like this and struck it.

Q. This is the part of the fusee that you struck?

A. Yes, sir.

Q. How long was that before you dismounted and fell into the creek?

A. Well, right afterwards; just right after the instant I struck it.

Q. Where were you, in what position when you struck the fusee?

A. Platform, just stepping down on the steps.

Q. Just stepping down on the steps?

A. Yes, sir.

Q. How long was that before you stepped over?

A. Well, I just stepped over there.

Q. You stepped off?

A. Made sure my fusee—just a second was all was lit.

Q. What kind of light did that fusee make at that time?

A. Not very much of a light, just struck it to make a light, and that's all, just sputters and makes a lot of smoke before it throws out the light.

[fol. 149] Q. You had the lantern and the fusee at that time in the left hand; what were you doing with your right hand?

A. Had hold of the grab iron with this hand.

Q. Did you still have hold of the grab iron when you went over the side?

A. Yes, sir.

Q. Now, Mr. Pauly, you stated that on cross examination that when the rear end of that train crossed the east switch points at Chacra that you were then in the rear end of the caboose?

A. Yes, sir.

Q. And that is true?

A. Yes, sir.

Q. How long had you been there, at the rear end at that time?

A. Not very long; just came down from the cupola and stepped out to the rear of the platform, just as we were crossing the east switch at Chacra.

Q. What was the purpose of your being at the rear end there?

A. Well, coming down—just as we come into Chacra, he made—started to stop the train, and we were slowing down, and I was just getting down out of the cupola, and—well, just getting down off the cupola, while we was up in the cupola, I might state, we saw the reflection around that curve. I stepped out the rear platform, noticed the train coming along, began getting brighter, we were slowing down more so than ever, you understand, preparing to stop.

Q. Of course, you knew at the time the rear end of this train passed the east switch points, that you were going to stop on the main line?

A. Yes, sir.

Q. Now, when, with respect to the time you left the rear end of the caboose, did you finally see and check Train 20 as it went by?

A. Off of the west end of the caboose.

Q. After you left the rear end of the caboose, did you ever go back out onto the rear platform?

A. No, sir.

Q. By the way, these depositions that Mr. Van Cott has called to your attention here, those depositions *was* taken some six months after you were injured, *was it* not?

A. Yes, sir.

[fol. 150] Q. You may state whether or not since that time you have made any effort to reconstruct in your own mind the events and particulars of the occasion when you got injured?

A. Yes, sir, I have.

Q. Has your thought on that matter refreshed your recollection?

A. It has, very much.

Q. Will you tell the jury now under your oath whether or not you were on the east end of the caboose or the west end of the caboose when you checked Train No. 20?

A. I was on the west end of the caboose.

Q. And so when you stated in your depositions that you were on the east end of the caboose, you were in error?

Mr. Van Cott: Just a moment, I object to counsel leading his witness on this vital point.

The Court: Objection sustained.

Q. Were you in error when you stated on August 2nd of this year that you were on the east end of the caboose when you checked this Train No. 20?

Mr. Van Cott: That is the same question, if the Court please, leading.

The Court: He may answer.

A. That is an error.

Q. When with relation to the time when you picked up your lantern and the fusee that you checked Train No. 20?

A. Will you state that question again, Mr. Black?

Q. Well, did you check Train No. 20 before or after you picked up the lantern and the fusee?

A. Well, as I remember it, I was in caboose, got my equipment, put my hat and overcoat on, had my fusee and light in my hands, as I stepped out on the rear platform I had in my hand as I checked the train.

Q. You were then ready to dismount?

A. That is correct.

Q. You may state whether or not at the time you gave the answers that have been called to your attention in the [fol. 151] deposition of August 2, you conscientiously attempted to state the truth.

A. I did, yes.

Q. Before August the 2nd of this time had you made any particular effort to reconstruct the events immediately preceding your injury in detail?

A. No, sir, all my time was devoted to getting myself on my feet.

Q. And you have devoted the time as you indicated since then?

A. Yes, sir.

Q. Now, this is preliminary to one other question, I think I would ask one question on direct: What kind of train was this that you fellows were moving that night that you were hurt?

A. Red ball freight.

Q. What do you mean in railroad language "Red ball"?

A. Freight that must be moved, should have no unnecessary delays to it, had a lot of Government material that should be moved right now, fast freight.

Q. Do you have any special orders or directions or instructions with reference to the moving of "Red ball freights"?

A. Well, they should have as little delay as possible; in fact they put other trains on the side tracks and move those Utes.

Q. Now, from your experience during 17 years of train service, will you state what is the purpose of the switchman's lantern?

A. To give night-hand signals.

Q. To give nighttime signals?

A. Night-hand signals; they are—your daylight signals would be with your hand, "come ahead" or go eight or so many cars. At night you have to have a light so they will understand. You have to use the light to say, "come ahead" or "go ahead" for so many cars.

Q. How do you use it when walking up and down trains in the night-time?

A. You just have it along in your hand, you don't use it. You walk along, see how they are going; you naturally walk right along with the light in your hand.

Q. Having in mind the work that you perform within switch limits, you may state whether or not you use these lanterns to light the pathway for your feet as you walk along either side of the train in night-time.

[fol. 152] A. No, you do not.

Q. I assume, Mr. Pauly, that during the 17 years you have been in train service, you have worked with numerous conductors and numerous brakemen in the handling of freight trains?

A. Yes, sir.

Q. During that time, have you noticed and observed the manner and method that they use in dismounting from cabooses?

A. Yes, sir.

Q. During that time, you may state whether or not it is customary and usual for conductors and brakemen to alight from the steps at the front of the caboose coupled to the car ahead?

A. Is it necessary?

Q. Is it customary?

A. No, they go out either end.

Q. Mr. Pauly, one question on damages that I overlooked: You may state whether or not your seniority as brakeman and conductor is sufficient to insure you steady employment on the railroad? Is your seniority sufficient to insure you steady employment either as brakeman or conductor on the railroad?

A. Yes, sir.

Q. Is your seniority sufficient so that you would have been employed all the time since the date of this accident?

A. Yes, sir, it would.

Q. Have you examined the call boards from time to time to determine that fact?

A. Yes, sir.

Q. Now, Mr. Pauly, I want to ask you to state whether or not you are familiar with and acquainted with bridges over creeks or canyons in the various yards of the defendant, and between various switch points in the divisions on which you were employed?

A. I am.

Q. And have you, during the 17 years that you worked for the railroad company examined and noticed those bridges?

A. Yes, sir.

Q. You may state whether or not the bridges that you [fol. 153] have mentioned—that is, bridges across creeks or gullies between switch points and other switch and passing tracks are equipped with a foot walk and hand rail?

A. They are.

Q. And are they painted?

A. They are painted white.

Q. Do you have a list there in your pocket of similar—of bridges that are over creeks and gullies between switch points?

A. Yes, sir.

Q. All right, let's tell the jury about it.

(Witness takes a paper out of his pocket.)

A. That is going east out of Grand Junction at Cameo, there is a bridge there entering switch points, has——

Q. Is that bridge between the switch points, or——

A. Right at the—entering switch points, "switch points," as we call them.

The Court: How do you spell that?

A. C-a-m-e-o.

Q. Describe the bridge and the walk and the hand-rail.

A. Well, it's—the length of it, you mean?

Q. Well, just go ahead and describe it.

A. Bridge about the length of the jury box, and, oh, I imagine it was about ten, fifteen feet deep, has hand rails and a foot walk on both sides of the bridge. Tunnel has a small bridge in the middle of it, extends through the passing track and the main line, and it has a hand-rail and foot walk. Egan has a bridge at east end on the—leaving the switch points; that is a rather long bridge, not very high; it has a foot walk and guard rail. And Beck has a very high bridge. It's in the middle of the—well, you know how the tracks extend. It is between the main line, it runs underneath both tracks, way I should state it, it has guard rails and hand-rails on both sides and it is painted white. Grand Valley has a small bridge, not very deep, and has a hand-rail, foot path, and it is also painted white. Of course, Chacra—let's see, Rifle has a bridge and it extends through both passing track and middle track on main line, and it has a hand rail and foot walk on the left-hand side, not on the [fol. 154] right, just on the one side, on the main line side. Chacra——

Q. There is no bridge there.

A. No bridge.

Q. Or no foot walk?

A. No foot walk on either side or hand-railing. Funston is a big high bridge; it has a foot walk, it isn't painted yet, and it has a guard rail on the east end of it and a foot walk across, all the way.

Q. And Funston is six miles to the——

A. East.

Q. East of Chacra?

A. And Dotsero has a bridge going towards the cut-off, and it was on the Y there, main line, as they call it, cut-off; it has foot walks on either side—guard rails, and foot walks, and it is also painted white. Going towards Minturn, there is one high bridge there—there are two high bridges there, one on the east switch point and one on the west switch point, both are equipped with hand-rails and foot walks, both are painted white.

Q. You have now completed your statement in response to my question?

A. Yes, sir.

Q. Now, Mr. Pauly, one question with reference to dismounting from this car, you stated you had your lantern and your fusee in your hand?

A. Yes, sir.

Q. As you were dismounting, attempting to dismount from the caboose immediately before you were injured, you may state whether or not you were looking down towards your feet. Just show the jury how you did it, what you did with your eyes, things of that kind.

A. I had my lamp and fusee in this hand.

Q. Left hand?

A. As I said, I had my light and the fusee in my left hand, and I just struck the fusee like that while I was still on the platform, you understand, as it was sputtering and smoking, and I saw it was really going to light—sometimes they go out—I might add these fusees don't always light, you understand, I was going to see, just took a couple of seconds as — went down the steps, glanced down. I did not make any examination with my light, glanced down; it looked black like it was the road-bed, and then I just stepped right off.

[fol. 155] The Court: I would like to have one of you ask him when he says, "I glanced down," where does he mean?

Q. Where did you mean when you said you glanced down?
A. Glanced down from my footing where I was stepping to, and it looked black.

The Court: Did you say "for" my footing?

A. Yes, sir, where I was stepping off.
Q. It looked black to you at that time?
A. Absolutely right.
Q. I think you stated on cross examination that you had had occasion to be on trains that stopped at Chacra on numerous occasions, and I think you mentioned that certain number—I have forgotten what it was—had been on trains stopped there in the nighttime?
A. Yes, sir.
Q. And that experience has extended, I take it, over the period of time you have been working out of Grand Junction?
A. Yes, sir.
Q. At Chacra and at—on other places on the line where you have had occasion to dismount from trains in the night-time, what has been your custom and practice with reference to dismounting? Just how do you get down from a train ordinarily in the night-time; that is what I mean?
A. Well, you just have your light in your hand, just dismount.
Q. Well——
A. You know where you are, practically; I mean you—I don't know.
Q. Well, you use your eyes for anything?
A. Certainly.
Q. Well, then, tell the jury about it, please. Go ahead, the custom of getting down.
A. You look down as you step, you don't make any examination with your light, you have your light in your hand, you just step down, see that it is black and you walk along for firm footing; you don't take any time to examination.
Q. Now, if a train stopped in the night-time at somewhere on the road, just on the main line tracks there, not within switch limits, would there be any difference in the way you [fol. 156] would dismount from a train when stopped out in the country, somewhere, strange territory?

A. Yes.

Q. What would you do in dismounting under those circumstances?

A. Well, it would be just a natural movement, it wouldn't be——

Q. Now, Mr. Pauly, I want you to understand this question; I am going to make it as simple as I can. Having in mind the train stopping in the night-time, just on the main lin, not within any switch limits——

A. Yes.

Q. —not within any yard, or anything of that kind, just to stop on the main line somewhere in the nighttime, in strange country, as you were dismounting from a train so stopped, what would you do?

A. What would I do?

Q. Yes, with reference to footing?

A. Well, you just look out there and you would have your light right there, and you would just step right off.

Mr. Black: That is all.

Recross-examination.

By Mr. Van Cott:

Q. You would use your light to see where you were stepping, would you?

A. Well, you don't make any examination with your light to see——

Q. No, but you——

A. You have your light in your hand, and it would be below you; you just step right off.

Q. You see the ground as illuminated by the light from your lantern, don't you?

A. Yes, sir.

Q. You wouldn't regard that as a misuse of your lantern, would you?

A. No, sir.

Q. You heard Ventura testify that when he stepped off this caboose just before it came to a stop, that he looked down at the ground and saw the ground by the rays of his lantern; you wouldn't regard that as a misuse of his lantern, would you?

A. No, sir.

Mr. Van Cott: Mr. Black, before I forget it, I want to offer in evidence Rule M of the Operating Rules and Regulations [fol. 157] as set forth in my Answer. I won't read it into the record, I will simply offer it in evidence as set forth——

Mr. Black: I think we admitted the existence of the rule, didn't we? There is no objection, your Honor, it may be considered part of the record.

The Court: All right.

Q. Have you ever counted the number of bridges between Grand Junction and Minturn?

A. No, can't say that I ever counted them.

Q. Would you say say there is about 67 of them?

A. I don't know about the number.

Q. And that there are only 16 of those 67 that have walks and hand-rails?

A. Well, I don't know; I haven't gone over them in my mind.

Q. You just counted those that you found with walks and hand-rails?

A. Yes, sir.

Q. That one in Cameo was within 400 feet of switch points, wasn't it?

A. It is right on the entering switch—switch points, yes.

Q. It is within 400 feet of switch points, is it not?

A. Oh, yes.

Q. And several others of these hand-rails and foot walks that you mentioned were within three or four hundred feet of switch points, were they not?

A. Well, right on the switch points, there wasn't—I wouldn't say three or four hundred feet.

Q. Well, they were within that, I mean.

[fol. 158] A. Yes.

The Court: Either on or within four hundred feet.

Q. Yes, that is what I mean.

A. All right.

Q. Now, it frequently happens, does it not, in operating trains that a train will come to a stop and the head brakeman has to make a run to a switch to throw a switch?

A. Yes, sir.

Q. Now, those bridges and hand-rails that are either at the switch or within three or four hundred feet are placed

there for the purpose of giving a thoroughfare to that head brakeman, isn't that right?

A. Just a moment, right now, just put——

The Court: Do you want to have that question reread to you? You said, "Just a minute," like you didn't understand or something.

A. At these particular places, yes, that's correct.

Q. Now, you testified in explanation of the testimony that you gave at the deposition which you now say wasn't true, that you hadn't reconstructed the accident, is that correct?

A. Yes, sir, at the time that I came to—yes.

Q. And that you only reconstructed it after you gave your deposition?

A. Yes.

Q. And you were—and you were saying that with particular reference to the evidence that you gave at the deposition, that you were on the back platform and checked that entire train No. 20 before you went back into the caboose; will you read that question—I am afraid I misstated it.

(Reporter reads the question.)

Q. Is that correct?

A. Yes, sir.

Q. Then you had,—that was your, what you thought was true at the time you took, you gave your deposition, wasn't it?

A. Yes, sir.

Q. And you had never reconstructed it before that?

A. No, sir.

[fol. 159] Q. I call your attention to your complaint which you say you swore to and which you stated as correct; call your attention to the allegation in paragraph 7, "That at said time defendant's eastbound passenger train No. 20 was passing said freight train over, upon, and along the said passing track immediately to the north of the main line tracks upon which defendant's Red Ball Freight Train was standing as aforesaid, and for that reason it would have been extremely dangerous and impracticable for plaintiff to have dismounted from said caboose on the right side thereof."

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. Now, if it had been true, as you said in your deposition, that Train No. 20 had been checked by you and had gone on to the east, then there would have been no danger on account of Train No. 20 being on that passing track, would there?

A. That's right.

By Mr. Black:

Q. Mr. Pauly, one further question that I overlooked yesterday in my examination: With respect to the sticking of brakes, I presume in the seventeen years of your train service, you have had occasion to see many sticking brakes in the night time?

A. Yes sir.

Q. You may state whether or not it is unusual for one brake on a set of trucks to stick, and throw fire, without fire being thrown from any of the other of the four wheels?

A. Sparks don't throw from any of the other four wheels if they are sticking on the one wheel, can't see them from the other side, only seen from one side.

Q. Nothing unusual, then, in just one brake sticking?

A. No sir.

Q. And is it often the case that one wheel, only, will throw sparks, throw fire?

A. Yes sir.

Q. What causes these brakes to stick, if you know?

A. Well, sometimes the dirty triple valve in the air cylin-[fol. 160] der; other times it might be that the conductor doesn't make a sufficient reduction in the train line, in the train line.

Q. You may state whether or not there is anything unusual in a situation where one brake shoe is thicker than the other brake shoes on a set of trucks?

A. They are—all railroad companies have working agreements between the different railroads, and then with their interchange of cars that is running over your railroad, and brake shoes are not up to shape, why that company replaces them, and then they trade the bills back and forth, but if they are wore down, this company puts on new brake shoes, and they may be thicker than the others. Some shoes may have new brake shoes on, and some quite worn, but still be

on, and they wouldn't change them all, but they would change the ones that didn't have enough braking power.

Q. They changed the thick ones?

A. That's right.

Q. These brake shoes are all made of metal, are they not?

A. They are.

Q. They are attached to beams, or set back against the wheels by the triple valve mechanism?

A. Yes sir.

Mr. Black: That's all. Thanks, Mr. Pauly.

Recross-examination.

By Mr. Van Cott:

Q. Mr. Pauly, it is true, is it not, that you see fire or sparks flying from a wheel and a brake shoe only when the train is moving?

A. Yes sir.

Q. When the train has come to a stop, the way you determine what truck has brakes that are sticking is to go along and find the wheels and brake shoe that are smoking and hot; isn't that correct?

A. Yes sir.

Q. And if one brake shoe on one wheel of a truck is sticking, and, as a result of that, is hot or smoking, then usually you find that all of the wheels on that truck are also hot and smoking, don't you?

[fol. 161] A. Yes; not as much as where your new brake shoe would be, of course, where your smoke is.

Q. Well, hot and smoking, so that you can determine?

A. Not necessarily, no.

Q. But usually?

A. From the braking side of the one that has the greatest braking power.

Q. I am talking about, not necessarily the wheel and the brake shoe that was causing the sparks to fly, but I am talking about the other wheels?

A. Oh yes.

Q. Wheels and brake shoe on that same truck?

A. Yes.

Q. Usually you find that they are hot and smoking, too?

A. Yes sir.

Q. You can determine from any one of those wheels that it is smoking and hot where the truck is; that has a sticking brake?

A. Yes, you can in daylight, but can't at night.

Q. You heard Mr. Ventura say that he determined that —the truck in this very case, from the north side, did you not?

A. I did.

Q. And you have done that, too, haven't you?

A. No sir.

Q. Don't you remember testifying as follows, when I took your deposition, page 40:

"Q. Usually when brake is sticking like that, doesn't it mean the brake shoe on all four wheels of the truck are sticking?

"A. Yes, sure.

"Q. Usually?

"A. Usually.

"Q. Why would that be, Mr. Pauly?

"A. What does that question mean, all brake shoes on one wheel?

"Q. No, I mean all brake shoes on the truck.

[fol. 162] "A. On that particular truck, yes.

"Q. Why?

"A. Well——

"Q. Isn't it because they are all controlled by the same brake cylinder?

"A. All right, yes."

You remember so testifying?

A. Yes sir.

Q. That is true, isn't it?

A. That's right.

Mr. Van Cott: That is all.

Mr. Black: That is all.

The Witness: May I add something to that?

Mr. Van Cott: Yes, you can add something.

The Witness: I mean just as an illustration.

Mr. Van Cott: Yes.

The Witness: That is the same as four-wheel automobile. You have equalized pressure with your automobile; maybe one wheel will stick, but all four wheels, you will have

braking power on all four wheels, just an illustration to the jury.

Mr. Van Cott: But, in case of the brake shoe on a single truck of a freight car, they are all controlled by levers that apply, so that they are applied at equalized contact with the brake cylinder; when the piston and the brake cylinder is applied, it is designed so that all of the brake shoes apply equally on all four wheels; isn't that correct?

The Witness: That is correct.

Mr. Van Cott: If there is a sticking—if there is a sticking brake, it is on account of the failure of the brake cylinder to release; isn't that correct?

The Witness: Probably might be dirty triple valve.

Mr. Van Cott: Yes; but dirty triple valve would be the cause of the brake cylinder failing to release the brakes from the wheels; isn't that correct?

The Witness: Yes.

Mr. Van Cott: It would be true of all four wheels, usually, [fol. 163] as you testified on your deposition?

Mr. Pauly: Yes sir.

Mr. Van Cott: That is all.

W. T. Linkins, having been heretofore duly sworn, was recalled as a witness, and testified further as follows:

Redirect examination.

By Mr. Black:

Q. Mr. Linkins, you testified in this case before, did you not?

A. I have.

Q. Mr. Linkins, during the many years that you have driven and operated locomotive engines of the defendant company, I will ask you to state whether or not you have observed the speed at which trains pass through and over the switch track at Chacra and other passing tracks on the line; what have you noticed with reference to the speed that trains go over those passing tracks at Chacra and other switch tracks?

A. Well, they are all different; that is, I don't mean all, but there is different speeds through the different passing tracks, if that is what——

Q. Tell the jury all you can about the speed?

A. Well, some of these turnouts is as low as fifteen miles an hour, and some of them as high as thirty-one—well, there is some of them eighteen, some of them is twenty-five. It depends on how short the turnout is, what the speed is.

Q. Well, do you call that turnout at Chacra a short turnout?

A. No, that turnout at Chacra is long—it is a thirty-one mile an hour turnout.

Q. And sometimes the trains move over that passing track at that speed, do they?

A. Well, they are allowed to, yes.

Q. Mr. Linkins, there was suggested yesterday, in one of the questions Mr. Van Cott addressed to Mr. Pauly, to the effect that on this division that you are working on—[fol. 164] that is, division between Grand Junction and Bond and Grand Junction and Minturn, there is sixty-seven bridges over tracks and gullies, and the like, that pass under the track; you may state whether or not these sixty-seven bridges are in switch limits, or are the majority of them on the main line track beyond switch limits?

A. Well, I'd—I never counted the bridges, or—but I would say that the majority of them is between switches that—between the different stations, the majority of them bridges; of course, there is bridges in a good many places that's between the switches and right at the switches, and——

Q. What is the condition? What have you noticed with reference to the condition of these bridges between switch points; that is, with respect to foot-walks and guard-rails?

Mr. Van Cott: If the court please, this is purely cumulative; I have no intention of producing any evidence to the contrary of what he testified.

Mr. Black: That is all I ask, and the witness may be excused as far as I am concerned.

Recross-examination.

By Mr. Van Cott:

Q. Just one question: In regard to the speed on passing tracks, Mr. Linkins, you say that on the passing track at Chacra *a* thirty-one miles an hour is allowable?

A. At the turnout.

Q. I mean on the turnout?

A. That is what the turnout speed is on the turnout.

Q. But, is there not also this limitation, that the engineer who is holding a train on that turnout is under the necessity of moving in such a way that he does not strike equipment that happens to be on that passing track?

A. Oh, yes, if he can't see where he is going, or where he is at, he might be right down to a mile an hour.

Q. And an engineer, even though the timecard permits him to run thirty-one miles per hour on that passing track, would limit himself to such a speed that would enable him to stop within the range of his vision of what might be on the passing track?

[fol. 165] A. Oh, yes, you have got to know where—whether there is anything on the passing track, and everything is clear, and be able to see a sufficient distance before you can attain that speed.

Q. And on a night such as you described this to be, January 27th, when this accident happened, I think you described as storm?

A. Yes.

Q. On a night such as that, what speed would you, as a competent engineer, move on that passing track, when you were on a curve, with a train on the main line?

A. Well, you get a pretty good vision; of course, you have got a headlight on an engine. You have got a pretty good vision, I would say you could maintain a speed of twenty-five or thirty miles an hour there without——

Q. Suppose you had——

A. With safety.

Q. Suppose you had your headlights dimmed?

A. Well, only time you dim your headlight is just as you are passing the other engine, and that gives the engine crew there a chance to identify you, and the same way you pass the caboose, you dim your headlight, give them a chance to identify you.

Q. I think Mr. Pauly testified that on this occasion, the headlight of the engine on No. 20 was dimmed as it passed the caboose. Now, he would have to be moving at a speed so that with his headlight dimmed, and moving on a curve, he would be able to stop in the distance that he could see equipment, would he not?

A. Yes, but he is pretty well off the curve at——

Q. Wouldn't you say he would have to be moving at a speed of less than twenty-five miles an hour?

A. No, I believe you can make twenty-five miles an hour over that bridge, and still see everything in the clear, because the headlight is just dimmed for an instant, then on again.

Q. Moving at a speed of twenty-five miles an hour, there isn't very much rocking to the train, is there?

A. Well, that depends altogether on the track; some of them passing tracks are a little rough, and some of them are pretty near as good as the main line.

[fol. 166] Q. What about the one at Chacra?

A. Well, it is a good track. I went in there, myself, and out of there at a pretty good speed.

Mr. Van Cott: That is all.

Further Redirect Examination.

By Mr. Black:

Q. What about the safety rules; boys ever examine the safety rules?

A. No, never examine—they have what they call "Rule A Day Program," and each month they make a list of these rules, one for each day, and they put out in the bulletin, and we are supposed to, when we go to work, look up the rules for the day, and then in case some official asks us what the rule for the day is, we are supposed to be able to tell him but—well, we don't always know and——

Mr. Black: That's all.

Further Recross-examination.

By Mr. Van Cott:

Q. Calling your attention to Rule No. 3 of the Safety Rules, which reads: "Before getting on or off equipment, employees must look out for a safe footing", you always comply with that rule, do you not, Mr. Linkins?

A. Well, I suppose I do. I have never got hurt, if I am not complying with it.

Q. If you didn't look, there would be plenty of places out on the line where you stopped where you would get hurt, wouldn't you?

A. Yes.

Mr. Van Cott: That's all.

Further Redirect Examination.

By Mr. Black:

Q. When you get down off an engine at night, you get your lantern out and make close examination of the ground that you step on?

A. I don't even have a lantern; I have just got to feel my way, sometimes I have got a torch, supposed to furnish the engineer with a torch, but they don't do that; if it isn't too awful dark, why, I just go in the dark.

[fol. 167] Mr. Black: That's all.

Further Recross-examination.

By Mr. Van Cott:

Q. It is possible to feel your way, too, isn't it, Mr. Linkins, before you jump off into space?

A. Yes, yes.

Offers in Evidence

Mr. Van Cott: Now, I offer in evidence Exhibit 3, the light.

The Court: If it hasn't been received, it may be so.

Mr. Black: No objection.

Mr. Van Cott: And I offer in evidence——

The Court: You can just call the red and yellow fusee.

Mr. Van Cott: I will call it red and yellow fusee. I agree with Mr. Black that probably shouldn't be retained in the files of the Clerk's office, because——

Mr. Black: Somebody might strike them.

Mr. Van Cott: They might be; between Mr. Black and myself, we can agree upon some safe place.

The Court: As a matter of fact, they are merely standard railroad yellow and red fusees; I assume they are no different than any other that would be supplied.

Mr. Black: I would have no objection to them being immediately withdrawn and delivered to the defendant as soon as the jury returns the verdict.

The Court: That's all right.

Mr. Van Cott: Those are ten minute fusees I offer in evidence.

May I ask to have this deposition published?

The Court: I assume so.

Mr. Van Cott: This volume, if the court please, contains three depositions—those of Ventura, Pauly and Linkins, [fol. 168] and I desire to offer the following portions of Mr. Pauly's deposition:

The first page, showing the title, and the proceedings, and then commencing on page 31, the last question on Page 31, to the end of the deposition.

I have discussed that with Mr. Black. He has stated he has no objection to it.

Mr. Black: I really don't see the purpose of it, your Honor.

Mr. Van Cott: It is to show——

Mr. Black: All they are doing would be to add to the record in the case.

Mr. Van Cott: Well, I tell you, the reason I don't offer the whole deposition is that I have that in mind, and don't want to encumber the record. We do want to show the continuity of the examination, particularly in view of Mr. Pauly's statement yesterday when I was asking him those various questions about something on page 33 that he seemed to think was——

The Court: Let me ask you this: You said to the end of the deposition of——

Mr. Van Cott: Mr. Pauly.

The Court (Continued): —of Mr. Pauly; that is from page 31.

Mr. Van Cott: Last question on page——

The Court: To that point and to the end of his testimony?

Mr. Van Cott: That's correct.

The Court: And you have no objection to it.

Mr. Black: I am going to make an objection to it. I am going to make an objection to it on the ground that all those questions were made a part of the record on cross examination; only thing it would do it would unduly emphasize certain parts of the testimony.

Mr. Van Cott: Of course, this court has in mind those questions and answers, and the continuity, but another court that didn't hear the witnesses might not.

The Court: The record will be the same.

Mr. Van Cott: This would become part of the record; [fol. 169] it would show the continuity of it.

The Court: You propose to read this into the record?

Mr. Van Cott: No, I don't; I propose to read certain questions and answers that I put to the witness, but not put the whole deposition, no, or not those portions that I have marked; I don't propose to read those to the jury, although I have no objection to them being read to the jury.

The Court: Well, will you read me the objection, Miss Reporter, I didn't understand the grounds of the objection, except it would unduly encumber the record.

Mr. Black: It is improper, irrelevant, and incompetent, and I also suggest to your Honor it would be a re-emphasis on portions and part of the record.

Mr. Van Cott: In view of counsel's statement, I will not read any part of the deposition, except those parts that I asked the witness about yesterday.

Mr. Black: You didn't propose that the jury have the deposition.

Mr. Van Cott: It is perfectly all right, as far as I am concerned, for the jury to have the entire deposition, perfectly.

The Court: Now, your proposal is to make part of the record the matters that he has now been examined about in this record.

Mr. Van Cott: Well, there are certain additional matters; for example, in my cross examination he, at one time, volunteered the statement:

"Well, you had better start with page 33 before you go to page 36."

That wasn't brought out, but I desire to have it part of the record, that is the reason I am offering it, and I want to have the sequence of the questions part of the record.

The Court: Now, you may recall him for such examination in connection with his deposition as you think is proper and pertinent, but, other than that I will have to sustain the objection.

[fol. 170] Mr. Van Cott: Well, in view of the Court's ruling, then, I ask to have the portions of the deposition that I have referred to and offered in evidence made part of the record, for the consideration of the reviewing court.

The Court: You mean—you refer to those parts of the deposition that were referred to yesterday?

Mr. Van Cott: No, I refer to the parts that I offered—the title page of the deposition, on page 1, and commencing with the last question on Page 31, to the end of Pauly's deposition.

The Court: That may be done.

Mr. Black: And we object to it on the grounds previously stated.

The Court: The request is granted.

Mr. Van Cott: Now, if the court please——

Mr. Black: What was the ruling?

The Court: The request of Mr. Van Cott is granted.

Mr. Van Cott: If the court please, during the examination of a witness, he referred to the lights in the court room, and I asked to have the record show the number of watts, or whatever the other—or whatever unit of measurement there may be, and your Honor kindly indicated you would——

The Court: Which I have neglected to do.

Mr. Black: Your Honor, we have now a lantern which has been identified as being not only similar, but identical with the one that the witness had at the time of the accident. The jury now has the lantern, would not at all be influenced by what might be determined from the examination of the size of those globes up there.

The Court: I don't think we need to discuss it. I will do as I said I would. I will find out—I think it is three hundred watts, these globes are, I am not sure. I——

Is it agreeable to take the bailiff's statement that these globes are all three hundred, except the one, and the other is five hundred watt.

Mr. Van Cott: Yes, that is agreeable.

The Court: I think the record should also show the globe [fol. 171] is encased in—what do you call them—names of those chandeliers—or "shields" is a good word, that there is a glass shield covering the globes here in the court room.

Mr. Van Cott: No. Defendants rest.

HARRY O. PAULY.

Direct examination.

By Mr. Black:

Q. Mr. Pauly, when do you use these yellow fusees? You use them in the night, don't you?

A. Yes sir.

Q. Don't ever use them in the daytime?

A. No sir.

By Mr. Black:

Q. Mr. Pauly, having in mind the light given off by a yellow fusee, you may state whether or not such light is, in its intensity, greater or less than the light of a switchman's lantern, when it is turned on spray.

A. Yes, the light is greater.

Q. Yes. Would the yellow fusee give off more light or less light, or how does it compare with the light given off by a brakeman's lantern when it is turned on spray?

A. I don't know how to compare it; I wouldn't say it throwed out greater light than your lantern; don't know how to say that, answer it.

Q. Well, having in mind these three hundred and five hundred watt globes that are here in the court room, would you say a yellow fusee gave off more or less light than these would if they were in the open, in the night time?

A. Well, fusees gives a colorless indication, I don't know about the brightness that the—that is what they are for.

Q. We are talking about illumination; how would the illumination given off by a yellow fusee compare with the illumination given off by a three hundred or five hundred watt globe, in the night time?

A. Well, fusee would be less than the three hundred watt light that is in this room.

[fol. 172] Q. Would it be greater or less than the lantern that was turned on spray, as to the illumination?

The Court: Mr. Pauly, if you don't know you can say so. I assume you are no expert on lights. If you have an opinion as to this matter Mr. Black is asking you, say so; if you can't, say so.

Q. That is it exactly; if you can give an opinion, say so.
A. I can't give an opinion, then, as to the illumination.

Mr. Black: That is all.

Cross-examination.

By Mr. Van Cott:

Q. You did testify the yellow fusee would give off less than a light such as is referred to in this court room, did you not?
A. Yes, just said that.
Q. Didn't you so state?
A. You mean now?
Q. Yes. You referred to it as three hundred watt, but, as I understand it, the figure was five hundred.

The Court: No, you are mistaken, he is correct; this is five. Three, he referred——

Q. How much less would you say the light of the yellow fusee gave off as compared with three hundred, as much——
A. I couldn't say.
Q. You couldn't say?
A. No sir.
Q. Just less. Would you say it was almost as much?
A. I couldn't say.
Q. Very well.

[fol. 173] In the District Court of Salt Lake County

[Title omitted.]

Deposition

Deposition on behalf of defendants, taken pursuant to oral stipulation, before E. M. Garnett, a Notary Public in and for the State of Utah, at 253 Federal Building, Salt Lake City, Utah, beginning at approximately 11:30 A. M. on Tuesday, August 1, 1944.

Appearances: Mr. Parnell Black, Of counsel for Plaintiff; Mr. W. Q. Van Cott, Of counsel for Defendants.

Whereupon the following proceedings were had:

[fol. 174] Q. How far was the caboose from the east switch at Chacra at the time you put in the new battery in your lamp?

A. I don't exactly know the position; as far as I remember it was in Glenwood Canyon, that is, the other side of Glenwood; some place along the line.

Q. Did you light your lamp before the accident?

A. Yes sir, I tested it.

Q. You tested it; I mean after you tested it did you then light it?

A. Yes.

Q. When did you light it?

A. When we stopped at Chacra I guess.

Q. Were you inside the caboose when you lighted your lantern?

A. Yes.

Q. You lighted your lantern before you went to the end of the caboose to dismount, is that correct?

A. That's right.

Q. Your lantern was then in good condition and shining brightly?

A. Yes sir.

Q. Did you have your spot on or the other?

A. The other.

Q. Why did you have the other?

A. The spotlight just throws a beam of light, where the other light is a general light.

Q. You think the spotlight would throw a beam the length of this room, is that correct?

A. Yes.

Q. On that night would it do so?

A. Yes sir.

Q. Then you would have been able to see an object the length of this room with the spotlight the night of this accident?

A. Yes.

Q. Which end of the caboose did you go to?

A. The west end.

Q. The head end?

A. Yes.

[fol. 175] Q. When you moved towards the head end of the caboose, the west end, did you then intend to get off the caboose?

A. Yes sir.

Q. Why did you intend to get off the head end of the caboose?

A. We were meeting a train there; I told my hind brakeman, I said "Now when we stop here I will go over and examine that car; you take care of the rear end." I went in to put on my coat and get my lantern and a yellow fusee, intending to go over and look at that car that was giving us the trouble.

Q. Why did you go to the head end to get off?

A. It didn't make any difference what end I got off; I didn't want to get off on the inside because we were meeting a train on that side of the track; that would be between the trains.

Q. You say you were meeting a train?

A. Yes.

Q. Had you been informed you were meeting a train?

A. No.

Q. Did you know what train you were meeting?

A. Yes.

Q. What train was it?

A. No. 20.

Q. Did you know its was No. 20 before you came to a stop?

A. Not exactly.

Q. When did you first know it?

A. We were on 20's schedule, and the fact we pulled into Chacra instead of stopping when the red fusee signal was given give me an indication we were meeting a train at Chacra.

Q. And you assumed that was train No. 20?

A. I assumed that was train No. 20.

Q. Because that was the time train No. 20 was supposed to be there?

A. Practically, yes.

Q. And your plans were on the basis of that being No. 20, is that correct?

A. I don't know what you mean. It could have been another train in there because it was CTC territory; train [fol. 176] orders or your timecard have no authority in there; operate by block signal.

Q. You expected it to be train No. 20, is that right?

A. You can let that question go either way; a freight train could have been ahead of 20 on 20's schedule; you operate by signal indications, but it was on 20's schedule.

Q. Then you knew it either was 20 or might be 20?

A. That's right.

Q. When did you first know it was 20?

A. Coming up the passing track.

Q. When it was coming through the passing track?

A. Yes, I checked the train; it is the duty of conductors to check trains meeting trains and take their engine numbers at the time they pass your train.

Q. Did you take the number of this engine as it passed you?

A. I didn't have time to put it in my book; I checked the number and the time of the train passing.

Q. What number was it?

A. 802, if I remember correctly.

Q. Where did you see that number?

A. From the caboose platform.

Q. I mean where was the number, on the side of the engine or where?

A. Yes, on the side and they have a number on the headlight.

Q. Where did you see it?

A. Number on the headlight.

Q. On the headlight?

A. Yes.

Q. You say you were on the caboose platform; were you moving?

A. No, we was stopped.

Q. How far was the headlight from you when you saw the number?

A. Just like passing—the engine was passing the caboose.

Q. And the caboose was then stopped, is that correct?

A. Yes.

Q. How long had the caboose been stopped at that time?

A. Just pulling to a stop; just pulling to a stop, then the train was pulling by; I checked to see what the train was.

[fol. 177] Q. The caboose was just pulling to a stop when you checked this number of this engine?

A. Yes sir, that's right.

Q. How far did the caboose go after that?

A. We were stopped.

Q. I thought you said you were pulling to a stop.

A. We just stopped—just pulling down to a stop, yes.

Q. Were you still moving?

A. No, not the way you say—the train was stopping—we were stopped, yes, we will say we were stopped.

Q. I am not trying to get you to say one way or the other; I am trying to get your recollection. You say you were moving to a stop; does that mean you were stopped or still moving?

A. I don't know how to state it; I imagine you would say we were just pulling to a stop; you couldn't say it was a movement; just stopping.

Q. Just that final lurch you mean the equipment gives as it stops?

A. Yes.

Q. At that time you were on the head end of the caboose, is that right?

A. When I checked the train I was on the rear end.

Q. When you checked the train you were on the rear end?

A. That's right. When I said to the brakeman "I will go over and check that car while we are meeting another train." Evidently I knew they had our signal, they were going to stop there.

Q. You were on the rear platform?

A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat.

Q. That all happened after you checked the train?

A. That is, my going through the caboose to get my coat, yes.

Q. Putting on your overcoat?

A. Yes, I had no reason to have it on—still in the cupola; as I started to get down with it this train came through the passing track, so I stepped to the rear platform to check it and told my rear brakeman to take care of the hind end, "I will check this car now."

[fol. 178] Q. When you say it was engine 802 did you then know it was train No. 20?

A. Yes.

Q. Why?

A. I checked the passenger equipment too; that is the usual passenger engine.

Q. Did you check the passenger equipment?

A. That's right.
Q. As it went by you?
A. Yes, that's right.
Q. When you were on the back platform?
A. Yes.
Q. What did the equipment consist of?
A. Baggage car, mail car, day coach and sleeper; four cars.
Q. Then after the train passed you going east you went back in the caboose and put on your overcoat and then went to the head end of the caboose, is that correct?
A. That is correct.
Q. Was there any other equipment in the passing track after train 20 passed you?
A. No, not right exactly then, no.
Q. Was there at any time that you saw?
A. No.
Q. You know some equipment came along after the accident?
A. Yes.
Q. But there was nothing on the passing track after 20 went east?
A. No.
Q. Until that equipment came that came after the accident, is that correct?
A. Yes.
Q. That is correct is it?
A. Yes sir.
Q. After you put your coat on then which way did you move?
A. Out the door.
Q. Which end?
A. West end or front end as you call it.
[fol. 179] Q. Why did you go out the front end at that time?
A. I don't know that there was any particular reason.
Q. You could have gone out the rear end, couldn't you?
A. Sure, but that would be further to walk about the cars; wasn't any sense putting on your coat and walking back through the car and getting off the hind end when your desk is on the front end and your coat and equipment is there; you pick it up and go out that door.
Q. Then which side of the caboose did you get down from?
A. Left side, facing west.

Q. Why did you get down on the left side?

A. Still on that curve—well, the main reason because that is where the trouble in the car was; wanted to check that car.

Q. You could check that at either side, couldn't you?

A. No sir.

Q. Why not?

A. Because sparks are not seen in that case; I would have seen the sparks on the other side of the train; they only came from one side.

Q. You wouldn't be able to find the car by sparks because the car wasn't moving, would you?

A. That's right.

Q. You would find the car by smoke coming from the brakeshoe or wheel, wouldn't you?

A. That's right; it would be red.

Q. You would find that smoke on either side of the car, wouldn't you?

A. Wouldn't necessarily be much smoke unless the wheel would be oily—had hot wheels; couldn't tell by smoke; tell mostly by heat; couldn't see the smoke—you could probably smell it.

Q. How would you tell it from the heat—would you feel the wheels, is what I am getting at?

A. You don't go along—the wheels would be hot on any cars from running; I didn't go over them—you mean from smoke? There is more or less little smoke there.

Q. What causes brakes to stick?

A. The engineer doesn't make enough reduction, train-[fol. 180] line reduction in the train to release the brakes on the hind end of the train.

Q. Of course if the engineer didn't make a sufficient reduction the brakes would be sticking all along the train, wouldn't they?

A. Most generally towards the rear of the train, yes.

Q. On this occasion you only saw the fire flying from one car did you not?

A. From one truck, yes.

Q. From one truck?

A. Yes.

Q. Both wheels on the side you saw it or just one wheel?

A. One wheel, looked like.

Q. Only saw it on one wheel?

A. Only saw it on one wheel.

Q. Usually when a brake is sticking like that doesn't it mean the brake shoes on all four wheels of the truck are sticking?

A. Yes, sure.

Q. Usually?

A. Usually.

Q. Why would that be, Mr. Pauly?

A. What does that question mean, all brake shoes on one wheel?

Q. No, I mean all brake-shoes on the truck.

A. On that particular truck, yes.

Q. Why?

A. Well——

Q. Isn't it because they are all controlled by the same brake cylinder?

A. All right, yes.

Q. You had a yellow fusee with you when you went to the west end of the caboose, did you?

A. Yes.

Q. Did you light it?

A. Not in the caboose; I did on the platform.

Q. You lighted it before you stepped down from the caboose?

A. That's right.

Q. Why did you do that?

A. A yellow fusee throws out more light; I could see [fol. 181] more of my train than with my lantern.

Q. How much light does it throw off—I mean by that how far could you see an object in the rays of the yellow fusee that night?

A. I don't know as to the distance; you could see more as you are walking along.

Q. Could you see an object further by the light of the fusee than you could by the light of your spotlight on your lantern?

A. With a yellow fusee you can see more as you walk along than you could with a lantern, see more space.

Q. How far could you see with a yellow fusee?

A. I don't know how to say it exactly,—when walking along the side of a train——

Q. Could you see 20 or 30 feet?

A. I don't know exactly the distance it throws the light out; as you walk along the side of a car, the fact the car is there that throws the reflection——

The Reporter: Will you kindly repeat that answer.

A. Well, I didn't use the fusee—what I am trying to get at—to see the whole object.

Q. Could you have seen an object as far away as 20 or 30 feet with that yellow fusee that night?

A. No.

Q. How far could you see it?

The Witness: I am trying to talk to him—you needn't mark it down.

A. The object of using a fusee wouldn't be to see an object. If walking along and you want to use a fusee, the fact the train is here you can see more of it as you walk along—reflection, whereas you wouldn't have much reflection if nothing around here. The object wasn't to throw a light—to see more of the ground—intenser light maybe I should say—to bring it more in focus, if you want it that way.

Q. At the time you stepped down from the caboose you had the lantern lighted and the fusee lighted, is that correct?

A. When I stepped out the door I cracked the fusee and had them in my hand as I stepped down.

Q. Did you look down there before you stepped?

[fol. 182] A. No, it was all black to me as if I was on the main line is all, on the side of the track.

Q. You didn't look before you stepped then?

A. No, my idea was I was going to go down to the car and look at it as fast as I could while we were still stopped; I picked up the fusee, took my lantern, cracked the fusee and stepped right off.

Q. Did you turn your lantern, the light of it, down below where you were going to step before you stepped down?

A. I had it lit; I didn't turn it downwardly; I would have the light in my hand; as I cracked the fusee I had it in my hand; I had this hand (indicating) on the hand rail of the caboose on this side; as I stepped down this hand would be here (indicating), the light would be here (indicating); as I stepped down you would figure you was on the ground ready to move.

Q. You didn't look down?

A. No; you are standing on the end of the caboose like this (indicating), you crack the fusee, the lantern in your hand.

Q. In which hand?

A. This hand (indicating).

Q. That is the left hand?

A. The left hand; the fusee in the same hand; as I stepped down I had this hand, the right hand, on the end rail on the west side of the caboose, swinging out to go over—like you swing out to go over to look.

Q. You were facing the caboose then?

A. I was facing the train.

Q. I mean facing the train?

A. Yes sir.

Q. With your back away from the train?

A. With my back away from the train, with my back to the caboose.

Q. You just stepped down?

A. I just stepped down.

Q. Without looking?

A. Yes, figuring that was the ground.

Q. At that time that you stepped down what was the condition of the weather?

[fol. 183] A. It was dark, very dark, black, I guess that is what you would say.

Q. Wasn't storming?

A. Just beginning to storm, to snow.

Q. Just beginning to snow?

A. Yes sir.

Q. Was there enough snow so it interfered with your vision?

A. No.

Q. Was there anything defective about the caboose, the hand-holts anything like that?

A. No.

Q. Nothing at all?

A. No sir.

Q. You didn't stumble on anything on the roadbed, did you?

A. No sir; I didn't hit the roadbed; as I stepped down I stepped out into space—the edge of the bridge.

[fol. 184] IN THE DISTRICT COURT OF SALT LAKE COUNTY

ORDER SETTLING BILL OF EXCEPTIONS—April 28, 1945

Honorable J. Alan Crockett, Judge of the Third Judicial District Court in and for Salt Lake County, State of Utah, who sat as trial judge at the trial of the above entitled case, hereby certifies that the bill of exceptions proposed by attorneys for defendants and the exhibits referred to in said volumes and identified (except two fusees and transcript of plaintiff's deposition) by marks made by the Clerk of the Court as follows: "Exhibit —- (in which blank appears the number or letter of the Exhibit) Case No. 71,948" which exhibits are as follows:

Exhibit A, a plan and profile of bridge 367.62 at Chacra, Colorado;

Exhibits B, C, D, E, F, H, K and L, each of which is a kodak picture;

Exhibit M, consisting of a bundle of 13 kodak pictures marked "Picture No. 1", 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14;

Exhibit P, a typewritten paper setting forth "Present Value of an Annuity on the Life Expectancy of a man age 36 years";

Exhibits N, O, Q, R, S, and T, each of which is an X-ray picture;

Exhibit 1, a kodak picture;

Exhibit 2, being 3 typewritten pages showing the gross and net earnings of plaintiff from 1937 to January, 1944;

Exhibit 3, an electric lantern;

Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, each of which is an X-ray picture;

Exhibit 15, a typewritten sheet setting forth, "Present Value of an Annuity on the Life Expectancy of a man age 36 years";

Exhibit 16, a typewritten sheet showing, "Statement of Monthly Earning of Harry Otto Pauly for the years 1937 to 1943 inclusive";

An unmarked yellow "Safety Fusee";

An unmarked red "Safety Fusee"; and

Transcript of the deposition of plaintiff;

constitute and set forth accurately and completely all of the evidence introduced, transcript of deposition made part of

the record, proceedings had, objections made, exceptions taken, orders, motions and rulings occurring, noted or [fol. 185] made during the trial of the above entitled case and subsequent thereto; and, pursuant to stipulations by attorneys for plaintiff, the same are hereby settled and allowed as the Bill of Exceptions in the above entitled case.

Dated April 28, 1945.

J. Allan Crockett, District Judge (Seal).

Attest: Alvin Keddington, Clerk, by W. H. Leslie, Deputy Clerk.

In the District Court of Salt Lake County

Appellants' Statement of Errors Relied on for Reversal —Filed June 27, 1945

I. The court erred in denying defendants' motion for a directed verdict.

II. The court erred in refusing to grant a new trial on the ground that the verdict of the jury was the result of passion and prejudice.

III. The court erred in admitting evidence, over the objection of defendants, Exhibit P.

[fol. 186] In the Supreme Court of Utah

No. 6846

Harry O. Pauly, Plaintiff and Respondent,

v.

Wilson McCarthy and Henry Swan, Trustees of the Denver & Rio Grande Western Railroad Company, Defendants and Appellants

Opinion—Filed February 18, 1946

Wolfe, Justice:

Appeal from a judgment under the Federal Employers' Liability Act in favor of plaintiff. Plaintiff, who was employed by defendant in interstate commerce as a conductor

on a freight train proceeding over appellants' line westerly out of Glenwood Springs to Grand Junction, Colorado, was injured by a fall when he alighted in the nighttime from a caboose, which was standing on a bridge or trestle so narrow on the south side as to afford no foothold to one getting off the train at that point.

Conflict in the evidence is very limited and, as we view it, unimportant. The undisputed facts are as follows: The accident happened about 11:50 p. m. on January 27, 1944, between the switches on the passing track at Chacra, Colorado. Shortly after leaving Funston, which is six miles east of Chacra, Pauly, the conductor, and Ventura, the rear brakeman, who were riding in the caboose, noticed sparks flying from a car about 15 or 20 car lengths ahead of the caboose. This was ordinarily a sign that the brake shoes were sticking and necessitated stoppage of the train. By means of a red fusee placed outside of the window of the cupola of the caboose Pauly signalled the engineer to stop the train. The train consisted of 86 cars, the engine and the caboose and was somewhere between 3870 and 4300 feet long. The fireman in the engine also noticed the sparks flying from the wheels. The head brakeman acknowledged the stop signal by motion of an electric hand lantern. The engineer stopped the train on the main track opposite and south of the passing track at Chacra at a point which put the caboose on a bridge spanning North Canyon Creek. The distance between the east and west switches of the passing track at Chacra is about 6600 feet. The bridge is 2000 feet west of the east switch. The engine was thus somewhere between 3870 feet to 4300 feet west of the bridge. [fol. 187] The engineer testified it was between 600 and 700 feet east of the block signal at the west end of the passing track.

The bridge is approximately 26 feet wide and 92 feet 6 inches long. The main line track is south of the passing track. The distance between the north rail of the main track and the south rail of the passing track is approximately 12 feet. The distance between the south rail of the main line track and the outside or southern edge of the bridge is 2 feet 9 inches. The overhang of an ordinary freight car or caboose is approximately 2 feet 6 inches. The lowest steps from the platforms at each end of the caboose reach to the edge of the overhang but not beyond.

Pauly, at the time and in the darkness, after the trai had stopped and while the caboose was standing on th bridge, released his hand from the hand bar on the side o the caboose and dropped off the steps of the front (west end of the caboose into space past the south edge of th bridge down to the creek bed about 17 feet below the bridg and was severely injured. There were no lights showing th presence of the bridge and no catwalk on the south side o the bridge but there was a walk over the bridge betwee the main and the passing track. Had Pauly stepped off th north side of the caboose he would have reached footin on this plank walkway. The night was quite dark. Th roadbed was of black ballast which made it indistinguishabl from the black timbers of the bridge. It was just beginnin to snow.

Pauly, at the time of the accident, was 36 years of ag He had been crossing over this particular bridge for seve years in both day and nighttime; had, he estimated, crosse the bridge 1000 times and had walked over the bridge be tween the tracks perhaps fifty times, ten of which ma have been at night.

The action is brought under the Federal Employers Liability Act as amended in 1939, 45 U. S. C. A. 51 et seq eliminating assumption of risk as a defense.

The complaint alleged negligence on the part of defend ants as follows:

"A. That at said time and place the defendants care lessly, recklessly and negligently so operated and main tained their tracks, roadbed and equipment and in pa [fol. 188] ticular the bridge which spanned the creek be tween the switches at Chacra, Colorado, as to cause plain tiff while acting in the course of his employment to b hurled headlong from said bridge onto the bed of th creek below, thereby and thus causing him to suffer th injuries and damages herein complained of.

"B. That the defendants, and each and all of them neg ligently, carelessly and recklessly failed and neglected t furnish plaintiff a safe place whereon and wherein to pe form the duties necessarily incident to his said employmen in this: that said defendants well knowing that their pas senger and freight trains were customarily and ordinaril stopped upon defendants' main line and passing tracks be tween the east and west switch points at Chacra, Colorad

at all times of the day and night and in all kinds of weather, and that it was usual, customary and necessary for members of various train crews to pass along said trains while they were so stopped upon said main line and said passing track for the purpose of examining said trains and the various cars therein, and that said bridge in darkness was indistinguishable, dangerous and hazardous, nevertheless wholly failed to make said bridge safe and wholly failed and neglected to build, construct and maintain a walk with handrails on the sides of said bridge and did wholly fail and neglect to provide any lights or markers to indicate the presence or the dimensions of said bridge and did wholly fail and neglect to provide any other means, whatsoever to give warning of the existence or the dangers of said structure, or to protect and shield their employees from the dangers thereof, as a result whereof the plaintiff while in the discharge of his duties was caused to and did fall headlong from the caboose of his said train over the edge of the said bridge and onto the bed of said creek resulting in the damages and injury to him as herein complained of."

There is no evidence in the record to support the allegations of paragraph 9A. The plaintiff was not caused to be hurled from the bridge by the operation of the train, nor by the negligent maintenance of tracks, bridge or roadbed. The train had stopped. The evidence is conclusive on the fact that Pauly was under the impression that the caboose had entirely passed over the bridge; that he did not use his [fol. 189] lantern which he had on his arm to make any examination of the place where he was to alight; that—giving him the benefit of that part of his testimony most favorable to himself—he "glanced down; it looked black like the roadbed and I just stepped off." There is no question as to Pauly's negligence. The jury found that he was guilty of contributory negligence and after finding his damage at $75,000, the full amount prayed for, subtracted $25,000 as the damage attributable to his negligence, leaving a net verdict of $50,000, which the court reduced as a condition of refusing a new trial to $34,500.

1. Were the passing tracks at Chacra a place to work: Was the region in between switches at Chacra a "place to work" as is meant by that term in the law of negligence? There were no industries in that locality or any spurs or

sidings on which switching was done. There was only a passing track. The main road was single tracked. The passing track was one of many on the road to take care of train "meets". It was in Centralized Traffic Control territory, which means that the trains are let in and out of the passing track by an operator without necessity of the local crew having to get off and throw switches. When there is trouble with the moving equipment on the road and it is possible to reach the passing track at Chacra the train moves in there so as not to hold up traffic. It is a fair inference that such sensible procedure is followed anywhere in single track territory. Undoubtedly if the trouble is such as will not permit the train to proceed into a passing track for inspection and remedy, the matter must be attended to at once on the main track. There is nothing to show that the procedure is any different at the Chacra passing track than at any other passing track when a train in trouble is moved there for inspection and remedy. Indeed the same sort of inspection and remedy in regard to hot boxes, sticking brakes, break-in-twos, broken air hose, might have to be made anywhere on the main line if a passing track could not be reached. The Chacra passing track was a more favorable place to stop than many sidings because it was a "high ball" station, viz., it enabled signals from the rear to be seen at the engine which was not the case in many parts of the road where the tracks curved through the mountains. But it would be only good fortune in that [fol. 190] respect that the trouble or its discovery occurred shortly before coming into Chacra.

Ventura, the rear brakeman, testified that trains are stopped at Chacra to enable other trains to pass and that "if there is any trouble with the train there, they see a red fusee back there, they should stop." Question: "Stop on the passing track to make an investigation?" Answer: "Yes sir." There is no evidence that investigations are made while the trains wait at the passing track or for any other reason, unless there is some trouble. There is no evidence that the procedure in that respect is different at Chacra than at any other passing track; that it was "usual, customary and necessary for members of the various train crews to pass along said trains while they were so stopped upon said main line and passing track for the purpose of examining said trains and various cars therein. * * *" If the passing track at Chacra is a place to work then every

other passing track on the road is by the same token a place to work. And in fact since repairs, adjustments or temporary improvisations may be necessary anywhere at any time along the main line, the whole main line would then have to be considered as a place to work for train crews engaged in spotting defects in cars or the locomotive which the motion of the train revealed and which interfered with its movement. Thus if the engineer discovered something wrong with his locomotive which necessitated his descending from his cab to inspect and remedy the defect, practically the entire shoulder along the roadbed would have to be kept safe for his descent because it must then be considered a place to work. We think the fact that because of facilitation of traffic, it is convenient to pull into a passing track to inspect and make temporary repairs does not constitute all the shoulder along the roadbed between switches of the passing track a place to work. As before stated, there is no evidence that the train crews were required to make train inspections at the Chacra passing track while simply waiting for a train to pass. The evidence is that in [fol. 191] the occasional instance when something goes wrong that interferes with movement at a point from which it is possible to pull into the Chacra pass, the engineer for convenience of traffic does so, and then inspection is made to exactly locate the trouble for the purpose of remedying it sufficiently at least to permit continuance of movement.

This is not the case where due to a failure to keep the tracks and roadbed in a safe condition, the engine or cars left the track or employees were hurled from the train to the injury of members of the train or engine crew. The engine and train is the equipment on which the engine and train crew work. It has been held that the tracks and roadbed where the train moves along also constitute, while the workmen are on the moving equipment, the place where they work and must be kept in reasonably safe condition so as to avoid accidents due to a defect in said roadbed or tracks while operating the train. Union Pacific Railway Co. v. O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766; Chicago & A. R. Co. v. Kerr, 148 Ill. 605, 35 N. E. 1117; St. Louis & S. F. Ry. Co. v. Weaver, 35 Kan. 412, 11 P. 408, 57 Am. Rep. 176; Cincinnati N. O. & T. P. R. Co. v. Zachary's Adm'r. Ky., 106 S. W. 842; Gordon v. Chicago R. I. & P. R. Co., 146 Iowa 588, 589, 123 N. W. 762. In Fink v. Slade, 66 App. Div. 105, 72 N. Y. S. 821, distinction was

drawn between a defect in the locomotive or cars which caused them to leave the track as compared to a defect in the roadbed. The first it was said was a defect in the machine which the master supplied, the second a failure to provide a safe place to work. In the instant case as far as Pauly's work on the train was concerned the train, roadway and bridge were a safe place to work. There was no giving away of the bridge which made Pauly unsafe while on the train. It was only when he left his safe position on the train without care to ascertain the safety of the place where he would alight that he put himself in peril.

The plaintiff sought to force this case into the framework of those cases where the work by its nature and purpose was necessarily confined to a limited locus or a particular spot and employee was required or it was reasonably necessary that he be at the danger spot, illustrated by the cases just following, the italicized portion of the explana- [fol. 192] tion note in parenthesis showing why it was a place to work: Bailey v. Central Vermont Ry. Co., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444 (Section hand unfamiliar with opening of hopper doors on car of ballast *spotted on bridge* over cattle pass was thrown from bridge having no guardrails by spinning of wrench by which he was opening the hopper doors. *Bridge of necessity was definite and assigned place to work.*) Chicago Great Western Ry. Co. v. Peeler, 8 Cir., 140 F. 2d 865 (Under Federal Employers' Liability Act after 1939 Amendment. Protruding plank as part of crossing caused appellee to trip while he was *engaged as switchman in assisting movement of cars in Des Moines yard.*) Smith v. Schumacker, 30 Cal. App. 2d 251, 85 P. 2d 967 (Embedded angle iron in ballast causing rear brakeman required to run for caboose after *throwing switch* to stumble.) Haskins v. Southern Pac. Co., 3 Cal. App. 2d 177, 39 P. 2d 895 (Under F. E. L. A. 1934. Plaintiff stumbled over tough umbrella plant root permitted to grow on right of way where plaintiff *was required to work in switching operation on a siding.*) Virginia R. Co. v. Staton, 4 Cir., 84 F. 2d 133 (Permitting spike to protrude on which brakeman's clothing caught *during a switching operation.*) Bly v. Southern R. Co., 183 Va. 162, 31 S. E. 2d 564 (Under F. E. L. A. Failure to provide a walkway on a bridge *where switching operations were conducted.*) Thomson v. Boles, 8 Cir., 123 F. 2d 487 (Under F. E. L. A. Failure to keep guardrail on bridge in

repair so that it gave way *while an employee engaged in giving signals* to engineer of work train engaged in driving piles in bridge.) Bimberg v. Northern Pac. R. Co., 217 Minn. 187, 14 N. W. 2d 410, 419 (Carpenter dispatched to repair a trestle constructed without guardrails and workmen not equipped with safety belts.) Knowles v. Southern R. Co., 177 Va. 88, 12 S. E. 2d 821 (Under F. E. L. A. Deceased *required to check and list cars on narrow bridge.*) Melody v. Des Moines Union R. Co., 161 Iowa 695, 141 N. W. 438 (Permitting snow and ice to accumulate in the switch yard *where plaintiff was assigned to work.*) Southern R. Co. v. Wilmouth, 154 Va. 582, 153 S. E. 874 (Under F. E. L. A. before 1939 Amendment. *Duty of Wilmouth to obtain at night list of car numbers* on bridge where plank flooring on west side ended leaving openings.) David v. Souder, 134 Va. 356, 114 S. E. 605 (Rolling action of cinders [fol. 193] allowed to accumulate on retaining wall under plaintiff's foot caused him to be precipitated over wall on which plaintiff was walking for *purpose of closing switch to spur tracks.*) Morton v. Alton R. Co., Mo. App. 118 S. W. 2d 59 (Under F. E. L. A. before 1939 Amendment. Deceased, a bridge painter, fell from bridge *while in usual work of delivering paint* and was drowned.) Hanson v. Great Northern R. Co., 128 Minn. 122, 150 N. W. 380 (Plaintiff while *at work in narrow area clipping surface of stone parapet* lost his balance and fell.) Southern R. Co. v. Newton's Adm'r. 108 Va. 114, 60 S. E. 625 (Railroad permitted open trench to exist on pathway along track *used by men at switching station for detaching cars while on the move.*) Cincinnati N. O. & T. P. Ry. Co. v. Zachary's Adm'r, Ky., 106 S. W. 842 (Charged that railroad failed to keep roadbed of connecting track in reasonably safe condition whereby train left track and conductor *engaged in switching* was thrown from car and killed.)

We do not think there is sufficient evidence to go to the jury on the question of whether the passing tracks at Chacra were a place to work. The answer put in the mouth of Ventura by the leading question "stop on that passing track to make an investigation?" appears by reference to his answer given just before to relate to the times when trains pull in there because of trouble. The engineer, Linkins, did not so testify. The inference from all the other testimony as

to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this use was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line.

This case, being under the Federal Employers' Liability Act, is governed by the Federal rule. Western and Atlantic R. R. v. Hughes, 278 U. S. 496, 49 S. ct. 231, 232, [fol. 194] 73 L. Ed. 473, where it was held that this Federal rule, viz.: "that it is the duty of the judge to direct the verdict, when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party" must be applied by the state courts in cases arising under the Federal Employers' Liability Act, citing Chicago, Milwaukee & St. Paul R. Co. v. Coogan, 271 U. S. 472, 474, 46 S. Ct. 564, 70 L. Ed. 1041; Gulf, Mobile & Northern R. Co. v. Wells, 275 U. S. 455, 457, 48 S. Ct. 151, 72 L. Ed. 370; Toledo St. Louis & Western R. Co. v. Allen, 276 U. S. 165, 168, 48 S. Ct. 215, 72 L. Ed. 513. Ventura's testimony can hardly be construed to mean that inspections were customarily conducted at Chacra regardless of trouble or that that station was signalled out in case of trouble as the one passing track into which the train should customarily proceed in case of trouble, but, if it can be so construed, it must be disregarded as totally at variance with the justifiable inferences of other testimony and at variance with the testimony of what must necessarily be done in cases of emergency. The only justifiable inference from all the testimony is that where there is trouble which materially interferes with movement, the train must stop and adjustments or repairs be then made unless the train can make it to an available and adequate passing track which in this particular case happened to be Chacra.

The facts in the instant case are almost identical with those in the case of Baltimore & Ohio R. Co. v. Berry, 286 U. S. 272, 52 S. Ct. 510, 512, 76 L. Ed. 1098, where an experienced brakeman, familiar with the run on which he was injured, alighted in order to fix a hot box in the night-

time from a caboose where it had stopped on an unguarded and unlighted bridge or trestle so narrow as to afford no foothold to one getting off the train at that point. The negligence assigned in the Berry case was not that the bridge or part of the track was a place to work and was not reasonably safe but that the railroad was negligent in stopping the caboose on the trestle and in that the conductor directed or permitted the plaintiff to alight there. The Supreme Court held that there was no negli- [fol. 195] gence in stopping the train where it was stopped and that there was no evidence that the conductor knew that the train had stopped there; that the brakeman's opportunity for knowledge was the same as the conductor's; that there was no evidence of a duty of the conductor to ascertain by inspection whether the brakeman could safely alight. We, therefore, do not think we can rest this case on the Berry case. The language of the Berry opinion reading "If negligence caused the injury, it was exclusively that of the respondent (brakeman)" would appear to cover the case of where a brakeman alighted without using his lantern (the situation in the Berry case) even at a place designated *nated* as one for work or by usage, custom or normal necessary operations made one in fact. But we are not prepared to hold that it went so far. The quoted language should, in resolving the doubt, be applied only to the facts of that case. Independently of the Berry case we have come to our conclusion that the passing track at Chacra is not a place to work as that term is used in the law of negligence relating to employer-employee relationship.

This conclusion is fortified by the recent case of Kenney, Adm'x. v. Boston & Maine R. R., 92 N. H. 495, 33 A. 2d 557, 560. The bridge in the Kenney case was in a territory between the working loci of the McElwain and Excelsior Sidings onto which cars were switched and spotted. There was no necessity in the switching operations revolving around the McElwain Siding to reach the territory on the south in which the bridge was located. Likewise, there was no necessity in the switching operations revolving around the Excelsior Siding to use that same territory on the north on which the bridge was located. The stop on the bridge on the dark night while the train was on the way

from the McElwain to the Excelsior Siding was unexplained. Said the court:

"Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe [fol. 196] as a work-place being anticipation * * * no duty in that respect can be found. The bridge was not a work-place in the sense that might perhaps have been found if the shifting operations were likely to result in a car standing on the bridge. * * *

"The deceased was not performing such work that the bridge was his contemplated work-place, findably required a rail for his protection. * * *"

In the case at bar it appears that bridges on the line between Grand Junction and Mintern which are within 300 or 400 feet from switches have walkways for trainmen who leave the train to throw switches. Such areas where the work of throwing switches is contemplated correspond to the area in the Kenney case where switching was done in reference to the McElwain and Excelsior Sidings; the bridge at Chacra corresponds to the bridge between those sidings in the Kenney case. Furthermore, on the bridge at Chacra there was a walkway between the main and the passing tracks which was available to Pauly had he alighted on the north side instead of the south side of the train, a matter which will be more fully noted hereafter.

In Yazoo & M. V. R. Co. v. Sudduth, 171 Miss. 619, 157 So. 527, 528, decided before the 1939 Amendment of the Employers' Liability Act and relied on by the appellant, the facts were much like the case at bar but the negligence charged was not in failing to provide a safe place to work but, as in the Berry case, supra, in the engineer's failure to instruct Sudduth not to get off on the side without the walkway. Whether, had the negligence charged been failure to provide a safe place to work, there would have been a jury question as to whether the place of the emergency stop was a contemplated place of work in view of

the fact that "on account of the crossing of two lines, a good deal of switching and interchange of cars is done there (at the unincorporated village of Harriston)", although there was a safe place to alight on the east side of the bridge, was not, of course, decided in that case.

In Davis v. Shirer, 4 Cir., 288 F. 293, 296, also relied on [fol. 197] by appellant, the court said, "No standard of reasonable care requires a railroad so to construct its trestles that they can under all conditions be safely used by pedestrians when a train is standing on them or moving over them." This case involved an emergency stop on a bridge not within any contemplated place of work.

Respondent relies on Cawman v. Pennsylvania-Reading Seashore Lines, 3 Cir., 1940, 110 F. 2d 832, 834. It is difficult to ascertain the basic facts of that case from the opinion nor is the negligence which was charged shown. The task of the court appeared to be one of distinguishing the case from the case of Baltimore & Ohio R. Co. v. Berry, supra. After cataloguing resemblances and differences between the Berry and the Cawman cases, the court proceeds to differentiate the cases on the ground that the theory of the Berry case was negligence of personnel whilst that of the Cawman case was "failure of material." If we are to infer that a "failure of material" was charged in respect to an omission to supply a walk and guardrail, we must further assume that under the facts of that case the jury could find that the place where the Pennsylvania train stopped was a contemplated place of work. Not so in this case. The mere fact both men injured in the Berry and Cawman cases had "frequent occasion to alight from the caboose platform of freight trains" would not justify the inference that every place at which they had occasion to alight was a place of work. In this respect respondent advances the proposition that had Ventura stepped from the rear of the caboose into a hole on the shoulder of the roadbed or on a piece of slag in the course of his duty as flagman and been injured it would present a jury question of whether his place of work had been kept reasonably safe. Assuming but not deciding for the purpose of the argument only that the strip along the roadbed behind any place on the railroad where the caboose stops is the contemplated place for the flagman to work because it is his duty to go back and granted further for such limited pur-

pose that the flagman's stepping down without using his lantern to discover where he was stepping, is only contributory negligence—thus still leaving the primary negligence of the company for the jury—it does not follow that [fol. 198] as to a conductor who has the choice of place to alight and a choice of a course to take to the point of trouble, the entire shoulder of the roadbed must be kept safe not only for his foot travel but to catch him if he fails to investigate the point of his alightment.

We conclude that under the evidence the passing tracks at Chacra were not contemplated as a place for work but must be considered as one with all the rest of the road in the matter of making emergency adjustments or repairs; that using the passing tracks for such repairs was for convenience only in not holding up traffic and not because by custom, designation or contemplation a place of work; that for reasons more fully set out hereunder, under the evidence this was not a jury question.

2. Was the absence of a walk on the south side of the bridge a defect or insufficiency due to negligence in "track, roadbed, or works" of defendant: Even if it be assumed that a contrary result should have been reached on the question as to whether the jury should be permitted to determine whether the passing tracks at Chacra were a place to work, the plaintiff cannot prevail on his contention that the railroad failed to keep it safe. That issue has been raised and we deem it well to pass upon it. If it was within reasonable contemplation that the Chacra passing tracks would be used to make emergency repairs and that constituted them for that reason a place of work for such repairs, was the appellant negligent in not providing a walk on the south side of its main track in view of the fact that there was a walk over the bridge between the tracks? In other words, in the phraseology of Sec. 51 of the Federal Employers' Liability Act, was the injury of Pauly due to the negligence of the carrier in permitting a defect or insufficiency in its roadbed or works (bridge) specifically an omission to furnish lights or a platform south of the main track?

When certain incidental and subservient questions are disposed of that question may be reframed in the light of our conclusions on such incidental questions.

The appellant contends that the evidence shows Pauly [fol. 199] to have been (1) negligent as a matter of law and (2) such negligence was the sole cause of his injuries. We think the evidence conclusive that Pauly was negligent. Interpreting the evidence most favorably to him it appears that even if he did look or glance down—a matter in which his own testimony is contradictory—he saw only blackness and while he had a lantern and a lighted fusee in his left hand he did not use them to discover what was before him. It expressly appears from the evidence that he thought the caboose had passed over the bridge. That impression so controlled his mind that he acted on the impression—a very human thing to do but nevertheless not what a prudent man would have done. He gives as justification for his getting off on the south instead of the north side of the tracks where there was a platform the explanation that it was (1) customary to get off on the side where there was no track because it was safer; and (2) that passenger train No. 20 was passing over the passing track at that time, and (3) that the sparks from the stuck brake showed on the south side and prompted him in order to reach the trouble in the quickest possible time to get off on the south side.

We comment briefly on these three reasons in view of the evidence. That safety and the custom born of it should ordinarily make trainmen choose the clear side rather than the passing track side is credible but safety rules are not ordinarily absolutes but must be applied according to the circumstances.

As to the passenger train passing at the time Pauly got off the front end of the caboose, this is in direct contradiction to the statements made in his deposition which was taken about six months after the accident and much nearer to it than the trial. At that time he testified that he left his place near the front of the caboose, went to the rear platform of the caboose and that No. 20 was then just coming up to the pass; that he then checked the engine and equipment on No. 20 as was his duty and then, after it passed, went inside, put on his overcoat, got his lantern and fusee and stepped to the front platform of the caboose and off into space. Certainly under that testimony No. 20 would have passed [fol. 200] when he got to the front platform. It consisted of the engine, tender, baggage car, mail car, coach and

sleeper. He had to remain on the caboose until it passed in order to check equipment. At the speed it was going—8 to 10 miles an hour—the engine and four cars would have passed before he went in to get his coat. At the trial he stated he had read his deposition and concluded that such testimony was wrong and that he had his coat, his hat and overcoat and went to the rear platform and then to the front platform where he checked No. 20 before he alighted. He gives no adequate explanation of how he came to testify as he did in the deposition where he gave in detail all his movements nor what it was that made him "reconstruct • • • the events and particulars of the occasion when he got injured" except that his thoughts on the matter refreshed his recollection. This is not the case where a witness testified in such terms or phrases as give room for an explanation of what he intended to convey by them. He testified in his deposition as to his positive actions and whereabouts in detail and in sequence when that testimony was closer to the events. Nor is it a case where the sequence of events or of dates or times may be all based on an event or time in regard to which, if a mistake were made, would shift the whole sequence or calendar of events. This is a reconstruction of the sequence of details arrived at after he had read the deposition and evidently in the light of a recognition that it would offer a fair explanation of his choosing the south rather than the north or platform side to alight. We think it questionable whether he is not concluded by the testimony of his deposition in that respect. But at all events even if he checked No. 20 from the front platform of the caboose just before he alighted it must have passed before he alighted because he had to remain until it was past to count the equipment. We think that the jury would necessarily have had to conclude from the evidence that No. 20 had passed or was so near past at the time he finished checking that it was no longer a danger to his getting off on the north side of the caboose. At least he could have waited a moment until it passed.

[fol. 201] As to the sticking brake being on the south side, the evidence is that ordinarily where one brake on the wheel truck sticks they all do and that the smoke emitted because of the heat generated may be discerned from either side. But, as before stated, the evidence is clear that Pauly was motivated to step down from the south side fundamentally because his mind was controlled by the impression that the

caboose had passed the bridge and that it need not be taken any more into consideration. That being so he naturally followed his habit of stepping off on the side away from parallel tracks. And doubtless his seeing the sparks on that side may have entered into the decision. But when all that is said it remains an inescapable fact that he was palpably negligent in stepping down without ascertaining what was below him. A moment of directing the light of the lantern or fusee down would have pierced the darkness to reveal the bridge. When he glanced down, if indeed he did glance down, he saw only darkness. That should have warned him to use his lighted lantern. The evidence shows its light was quite powerful and also that the light of the fusee if held so as not to blind him would have disclosed the perils of the bridge. But if he looked he did not see and knowing that he did not see he lets himself go from a safe place into space. Gravity operates on him and carries him past the edge of the bridge to the creek bed. The jury found he was negligent and his counsel spent no time in denying it. They contend that the jury under sec. 53 of the Act may diminish total damages in proportion to the amount of negligence attributable to the respondent.

The respondent must of course prove negligence on the part of the appellant in order to recover under the Act. This is basic. See cases under note 557, 45 U. S. C. A. 51. The plaintiff charges the railroad with negligence in failing to provide a safe place to work but in view of the negligence of the plaintiff the charge really amounts to a failure of an alleged duty to place a platform so as to intercept the hapless course of the plaintiff started entirely by his own negligence.

Fortunately through the 1939 Amendment to the Fed-
[fol. 202] eral Employers' Liability Act the cruel doctrine that the employer's negligence, if known to the employee, was assumed, has, it is hoped, been forever abolished in the railroad industry. By the Amendment the assumption of risk doctrine has been completely abrogated. As noted by Mr. Justice Frankfurter in his concurring opinion in the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 69, 63 S. Ct. 444, 87 L. Ed. 610, 143 A. L. R. 967, many cases even before the amendment were wrongfully withheld from the jury or decided by juries under wrong instructions because of a pseudo assumption of risk doctrine. The distinction pointed out by Mr. Justice Frank-

furter was clearly recognized as early as 1862 in the case of Ryan v. Fowler, 24 N. Y. 410, 82 Am. Dec. 315. It is to be hoped that in industry generally this differentiation between a workman having assumed the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law. Thus we are not any more concerned with the assumption of risk doctrine whether the risk was inherent in the industry or due to the negligence of the railroad. Whether the railroad is liable for injuries depends entirely on whether it was negligent and whether that negligence caused or contributed to the injury.

This is not a case where the plaintiff's and defendants' negligence converge to initiate the journey or mishap; nor the case where the railroad maintains a trap like an unblocked frog into which the workmen's foot except with the greatest of care may become wedged, Spencer v. New York Cent. & H. R. R. Co., 67 Hun, N. Y., 196, 22 N. Y. S. 100, nor the case of a hole or a protuberance in the pathway, which is the employee's place of work, likely to cause unbalance, Southern Pac. Co. v. Seley, 152 U. S. 145, 14 S. Ct. 530, 38 L. Ed. 391; Delaware, L. & W. R. Co. v. Koske, 279 U. S. 7, 11, 49 S. Ct. 202, 73 L. Ed. 578; Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55; Southern R. [fol. 203] Co. v. Newton's Adm'r, 108 Va. 114, 60 S. E. 625; Chicago Great West. Ry. Co. v. Peeler, supra; Haskins v. Southern Pac. Co., supra; Melody v. Des Moines Union Railway Co., supra; nor the case of the railroad carrying a trainman in the course of his duty on top of a car toward a low bridge without a tell-tale to warn him of the danger into which he is being carried. Choctaw, Oklahoma & G. R. Co. v. McDade, 191 U. S. 64, 67, 24 S. Ct. 24, 48 L. Ed. 96; Baltimore & Ohio & Chicago R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; Atchison T. & S. F. R. Co. v. Rowan, 55 Kan. 270, 39 P. 1010; Sherman & Redfield, Negligence, Sec. 210, p. 507 and Notes.

The books are replete with cases where a dangerous condition maintained has trapped a workman because in the intentness on his work he did not keep the danger sufficiently in his consciousness. Often moving into unguarded machinery may be avoided only by such alertness as would be more than could normally be expected even from the

udent man in his work movements. Often the intentness quired for a job precludes that alertness needed to avoid jury in places of danger and if maintained would interre with the efficiency of that work.

Certainly where the danger is one which lies in wait for e workman, likely to be a trap or to be encountered indental to or in the very motion of his ordinary work ovements or where the condition is such that, either by ncurring with his negligence or without negligence on s part, projects or transports him into danger, and where was reasonably foreseeable that such condition might use harm although just how or by what means or to what tent the harmful results would ensue may not have been prehended, a question of the carrier's negligence is prented. But here the mishap was initiated entirely by the gligence of the respondent not assisted nor contributed by the appellant. There was no jerk which dislodged m, no converging of a dynamic negligence—negligence in tion—of the appellant contemporaneous with respondt's negligence or preceding it which induced, activated, rthered or gave rise to his negligent act; nor was there ol. 204] any static negligence—a negligent condition—eated or permitted by the appellant which induced, invited caused the negligent act of the respondent; nor was there ter the initiation of a negligent act by respondent any ccessive act or action of appellant which turned the course respondent into a dangerous channel or aggravated, conrred in or added to the predicament in which his sole act d placed him; nor was there any dangerous condition eated by the appellant lying in wait for respondent into hich his negligence precipitated him or which diverted projected him from a course which might otherwise ve been uneventful or which added to or aggravated the ngerous plight which his negligence solely started. The spondent, under the spell of the impression that he was ross the bridge, intentionally left a position which was fe without taking proper precautions to ascertain the ture of the footing below him and dropped into space, arting himself on the career of disaster. The negligence ascribes to the appellant is the omission of lights which ight have warned him not to commit the folly and a platrm which would have intercepted him after he had started mself on his hapless course. The test of whether appelnt in such case was guilty of a negligence of omission

is whether it could be reasonably anticipated that Pauly would drop off in the dark without using the means furnished him—in this case a lantern carried with him—to discover the nature of the terrain under him, when there was a walk on the other side safe to alight upon and in the face of a rule which instructed him that "Before getting on or off equipment, employees must look for a safe footing".

We note in passing the contention of appellant that plaintiff's violation of Safety Rule No. 3 that requires employees to look for safe footing before getting on or off equipment was the sole cause of the accident. It should be observed that this rule was not one to safeguard traffic as in the cases of Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; Southern R. Co. v. Youngblood, 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124. It was a cautionary rule for the safety of the employee. It simply [fol. 205] put in rule form a precaution which common sense would without the rule have prescribed as proper care on the part of a prudent man. See Norfolk & W. R. Co. v. Riggs, 6 Cir., 98 F. 2d 612; a violation of this rule therefore rises no higher than a lack of due care and not as appellant contends a violation of a rule designed to prevent traffic accidents which violation was itself the cause of the accident such as in the three cases first cited.

Ordinarily there would be no occasion to get off for the purposes of throwing switches at the Chacra passing track because they were controlled by a central traffic control station. Only in case where trouble occurred on such place on the line as to permit the train to pull into the passing track at Chacra would there be any need of the conductor alighting. The chance of the caboose stopping on this bridge would depend on where the train stopped and its length. It is obvious that the chances that it would be stopped there as against some other place between the switches of the Chacra passing were small. The chances that if it was so stopped on this bridge the conductor would get off or if he did that it would be on the south side of the main track and that he would not at night investigate before he alighted were so remote as to make such mishap only a possibility and not a probility. The employer need not guard against the mere possibility that an employee may start himself solely by his own act on a course of mishap,

and make the premises safe against such possibility even granted it is a place to work. In the oft quoted passage by Sir Frederick Pollock: "If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things."

The defendant could not reasonably have anticipated that the plaintiff would expose himself to a danger which the most ordinary foresight exercisable when he was in a position of safety with ample time and deliberation to exercise that foresight would have avoided. Fort Smith [fol. 206] Gas Co. v. Cloud, 8 Cir., 75 F. 2d 413, 97 A. L. R. 833; Main Island Creek Coal Co. v. Chesapeake & O. R. Co., 6 Cir., 23 F. 2d 248; Davis v. Schroeder, 8 Cir., 291 F. 47.

The railroad is obliged to furnish not an absolutely safe place for the employee to work but one reasonably safe. This rule does not mean that it must remove all possible danger, but all such danger as it can remove or guard against by the exercise of reasonable care. Patton v. Texas & P. R. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361. Union Pacific R. Co. v. O'Brien, 161 U. S. 451, 16 S. Ct. 618, 40 L. Ed. 766, Cincinnati N. O. & T. P. R. Co. v. Zachary's Adm'r., Ky., supra; Melody v. Railway Co., supra; St. Louis & San Francisco Railway Co. v. Weaver, 35 Kan. 412, 11 P. 408, 57 Am. Rep. 176; Nutt v. Southern Pacific Co., 25 Ore. 291, 35 P. 653; Atchison T. & S. F. R. R. Co. v. Wagner, 33 Kan. 660, 7 P. 204; Gulf, C. & S. F. Ry. Co. v. Wells, 81 Tex. 685, 17 S. W. 511; also Chicago & A. R. Co. v. Kerr, 148 Ill. 605, 35 N. E. 1117.

The appellant contends that the negligence of the plaintiff was the sole cause of his injuries. This necessarily involves the question as to whether the appellant was itself guilty of negligence which concurred in producing the accident. If the appellant had a duty to construct a platform on the bridge on the south side of the main line in order to intercept the drop of the respondent or, put in another way, to make it safe for him to get off regardless of his care or lack of care, then failure to do so was negligence

which negligence, since it failed to preserve the respondent safe from his own lack of care, was a concurring cause of the accident and his negligence was not the sole cause. If, on the other hand, the appellant did not owe such duty, it was not negligent in not so constructing the platform and there being no negligence which concurred in or contributed to the respondent's negligence, his negligence was the sole proximate cause. Thus we are referred back to the fundamental question under consideration, viz., whether [fol. 207] the appellant owed any duty to the plaintiff under the circumstances in this case. That involves an application of the time worn principle as to whether the defendant as a prudent person could or should have reasonably anticipated that (1) a caboose would stop on the bridge and (2) that the conductor in the caboose would step off without looking, or, if he looked, would, in seeing nothing but darkness, nor use his lantern to reveal the situation under him especially when there was a platform on the north side of the main track on which he could have alighted. And this is all on the assumption that the passing track was a place to work. If it is not a place to work—which we have already determined that it is not—a prudent person would certainly not have been under obligation to have anticipated such result. Certainly a prudent railroad could have anticipated that a caboose might be stopped on the bridge. But it could also anticipate that the times it would stop on the bridge would be few compared to the times it would stop off the bridge. But that when it did happen to stop on the bridge that the conductor or other employee would drop down in disregard of ascertaining what was under him when there was a platform on the other side, would be only a remote and only a possible risk which a prudent person would not consider need be guarded against. A neglect to do so cannot be considered negligence. An omission to guard the plaintiff against such contingencies would not have caused or contributed to his accident, or put another way, the plaintiff's accident would seem to be the sole result of his negligence and not a contributed result of the lack of a platform to stop him. It seems somewhat a confusion of concepts to say that the injurious result of the plaintiff's carelessly dropping himself into space was due to the defendant's omission to stop him when he did so.

3. Are questions one and two above jury questions: Being mindful of what is said on page 463, 10th Ed. of Pollock on Torts, that "the tendency of modern rulings of Courts of Appeal has been, if not to enlarge the province of the [fol. 208] jury, to arrest the process of curtailing it," and also the fact that too often in the past courts have taken it upon themselves to decide that railroads were not in law negligent when the question of due care was one for the jury, we have concluded that under the evidence neither of the above questions are for the jury.

In the concurring opinion in the recent case of Hess v. Robinson, et al., Utah 163 P. 2d 510, there are set out excerpts from the Restatement of the Law of Torts and from Pollock on Torts, 10th Ed., as to when the question of negligence is for the jury and when for the court. Reference is made to that opinion for such excerpts. There is no dispute that a line between the functions exists. The difficulty arises in determining where the line is to be drawn in varying fact situations.

Certainly reasonable minds could not differ as to the fact that Pauly was negligent and that his negligence alone started him on the course which ended so disastrously for him. The remaining question is whether under the evidence of this case the jury should be allowed to pass on the question as to whether there was a defect or insufficiency in the roadbed of the carrier due to its negligence through or by reason of which plaintiff's injuries were caused or contributed to. We have above concluded that as a matter of law the railroad, as a prudent person, was not exposing Pauly to an unreasonable risk by not placing lights or a platform on the bridge or by not placing a platform on the south side so that he might alight on that side of the bridge without harm when he did not have to alight on the bridge at all or might have done so safely if he had dropped down on the north side of the main track; hence, the railroad was in law not under a duty to anticipate that he would so act to his detriment and to save him from the consequences of his act. The railroad was not under duty to guard against all possible risks or dangers especially when the possibility of harm arose only when the employee was lodged in a safe place and not in motion and by his own lack of care took himself out of such position due to a false impression and projected himself on the course which unintercepted could only result in injury.

[fol. 209] There was no risk in this case until Pauly let go the hand holds. We do not think there could be any reasonable difference of opinion that no such duty existed on the part of the carrier whether the passing tracks at Chacra be considered as a place of work or not. We do not think there could be any reasonable difference of opinion that the railroad acted with due foresight or that there was no "omission" to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, could do, or the doing of something which a prudent and reasonable man would not do. The railroad could anticipate that if an employee dropped off on the south side of the bridge without looking or on a dark night without making sufficient investigation, the natural and probable consequence would be that he would drop to the bed of the creek, but it need not anticipate that he would commit such palpable negligence and that it must therefore construct its bridge so as to save him from the effects of such negligence. If it was under duty to anticipate that he would so act negligently then it is under duty to foresee almost any possible negligence on his part and to take any practicable precaution to prevent the consequence of such unexpected and unlikely negligence. To the argument that it is a jury question if there can be a reasonable difference of opinion as to the duty of the railroad to guard against the consequences of such an eventuality as in this case occurred, the answer is that we do not think there would be such difference of reasonable opinion. That, in the last analysis, must rest on the judgment of the trial court subject to review as to whether in that regard his judgment was correct.

Said Lord Cairns in Metropolitan Railway Co. v. Jackson, 3 App. Cases 193, 197; 47 L. J. C. P. 303: "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred, the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the [fol. 210] greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of a jury, if, in a case where there are facts from which negligence may reasonably be inferred, the

judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

And Lord Blackburn in the same case at page 207:

"On a trial by jury it is, I conceive, undoubted that the facts are for the jury, and the law for the judge. It is not, however, in many cases practicable completely to sever the law from the facts.

"• • • It is for the jury to say whether and how far the evidence is to be believed. And if the facts, as to which evidence is given, are such that from them a further inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the judge to determine, subject to review, as a matter of law whether from those facts that further inference may legitimately be drawn."

And Lord Gordon in the same case at pages 210, 211:

"The duty of a judge in such a case is an exceedingly delicate one, as the line of division between what is proper to be submitted to the jury, as necessary to support a charge of negligence in point of law, and what may be submitted to the jury as sufficient to support a charge of negligence in point of fact, is often a very narrow one. But I agree in what was said by Mr. Justice Willes, in the case of Ryder v. Wombwell (Law Rep. 4 Ex. 32 at p. 38) which has been quoted by Lord Blackburn, that 'there is in every case a preliminary question, which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit [fol. 211] if the onus is on the Plaintiff, or direct a verdict for the Plaintiff if the onus is on the Defendant.'

• • • • • • •

"• • • I concur with your Lordship on the woolsack in thinking that it is impossible to lay down any rule, ex-

cept that from any given state of facts the Judge must say whether negligence can be legitimately inferred, and if the Judge is of that opinion, then it is for the jury to say whether it ought to be inferred." See also Union Pacific Railway Co. v. McDonald, 152 U. S. 262, 14 S. Ct. 619, 38 L. Ed. 434.

The obligation to determine whether minds could reasonably differ as to whether under the evidence a prudent person would have acted differently is always with the court. If he is in doubt he should put it to the jury. If he has no doubt that all reasonable men must conclude that the defendant met the legal standard of care, that is, that he did what a prudent person would have done under the circumstances or the thing he omitted to do is what a prudent person could under the circumstances have omitted, he must withdraw the case from the jury. Otherwise, all cases must go to the jury. It would alone be the ultimate arbitrator under all circumstances of what was prudent conduct or the lack of it. While the law may be tending in this direction it has not reached that point. We think that this is one of those rare cases where the "permissible inferences (from the facts) are so certain that reasonable men, in the exercise of a fair and impartial judgment, must agree upon and draw the same conclusion." Bimberg v. Northern Pac. R. Co., supra (217 Minn. 187, 14 N. W. 2d 411.)

To conclude: We have no doubt in this case that the appellant is not guilty of negligence in relation to the respondent in failing to place lights on the bridge nor in placing a platform on the south side of the main tracks on the bridge. We think the case should have been withdrawn from the jury. It thus becomes unnecessary to consider the other questions in the case. The judgment is reversed with instructions to dismiss. Costs to appellant.

Larson, C. J., and McDonough, J., concur.

Separate Opinion

Turner, Justice:

I dissent. I am of the opinion that the complaint states a [fol. 212] cause of action, and if the evidence supports the allegations therein contained, the plaintiff is entitled to a judgment.

This case was tried with a jury sitting to determine the facts. The prevailing opinion holds that there was not sufficient evidence to go to the jury as to the place where Harry O. Pauly was working when injured being a place to work, under the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq.

Mr. Justice Wolfe has described the railroad tracks at Chacra, Colorado. The passing tracks are approximately 6000 feet in length. They are situated at a very favorable place, where clear vision can be had from one end of the passing tracks to the other.

The opinion recites, that Pauly had been crossing over the bridge for several years. He knew the ground. He had walked across the bridge from which he fell or which he missed, at least 50 times and at least on ten occasions he had gone over the bridge at night. Ventura, the brakeman on the train testified as to the use the passing tracks were put to.

At the time of the accident the train Pauly was in charge of was traveling west. It remained on the main tracks at Chacra while trains coming from the west could pass by using the side or passing tracks. The Pauly train had stopped to repair a hot box. Both the conductor and brakeman knew the need for stopping. The hot box had also been seen by the engine crew.

Mr. Justice Wolfe makes this conclusion: "If the passing track at Chacra is a place to work then every other passing track on the road is by the same token a place to work" and then later says, "The whole main line would then have to be considered as a place to work."

If I thought it were my prerogative to pass upon the evidence and I could reach the same conclusion as Mr. Justice Wolfe there would be no need of this dissent. However, I think Mr. Justice Wolfe, from the facts revealed by him in his opinion, is not justified in drawing such conclusions.

I believe that the case presented a jury question and that the trial court properly submitted the matter. This conclusion is supported in a recent case, Bly v. Southern R. [fol. 213] Co., 183 Va. 162, 31 S. E. 2d 564.

This case is very similar to the case at bar and supports this dissent both as to the necessity of submitting the case to the jury and finding that an accident which occurred under quite similar circumstances happened at

"a place of work." I recommend that all interested read this opinion, part of the syllabus of which is as follows:

> "4. An unsafe place to work provided by master for the servant is a violation of one of the non-assignable duties of the master, and amounts to negligence.
>
> "5. Generally, negligence is a jury question where there is a conflict in evidence with relation to existence of facts from which negligence may be inferred, and where there is room for difference of opinion between reasonable men as to the inferences, which might fairly be drawn from conceded facts."

See also Chicago Great Western R. Co. v. Peeler, 8 Cir., 140 F. 2d 865. I quote from the syllabus:

> "1. In determining sufficiency of evidence on appeal, where jury found for plaintiff after motion for a directed verdict was overruled, the court was bound to resolve all conflicts in the evidence against defendant and plaintiff was entitled to the benefits of such favorable inferences as the jury might reasonably have drawn therefrom."
>
> "5. In action under Federal Employers' Liability Act, jury could believe testimony of plaintiff though it was directly contradicted by testimony of defendant's witness."

The case cited supra is used by Mr. Justice Wolfe in his opinion but it does not support his contentions but is authority to the contrary. I also call attention to a recent decision from the United States Supreme Court, Bailey, Adm'r. v. Central Vermont Railway, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, decided May 24, 1943. In this case the court held the question of facts was one for the jury and also upheld the original trial court's verdict based upon a finding that the injured workman was hurt when employed at "a place of work."

The case of Haskins v. Southern Pacific Co., 3 Cal. App. 2d 177, 39 P. 2d 895, is similar to the one at bar in many respects. The person injured alighted from the train he was working on at a station or siding called Numana, Nevada. There were passing tracks, a station, and a place to unload freight. The brakeman was off the train between

the tracks for the purpose of looking for hot boxes. This case supports the contention that the problem of fact is a jury question, and, I feel, supports the case at bar in [fol. 214] other respects.

Feeling that the factual conclusions in the prevailing opinion are not warranted and that the court has failed to give these more recent cases proper weight and application, I feel the necessity of this dissent.

WADE, Justice:

I dissent. I believe there was sufficient evidence to go to the jury on the question of whether the place where the accident happened was a "place of work" and the court did not err in so submitting it. There was evidence that when trouble developed on a train it was customary to bring it onto the passing track, if possible, before inspection and repairs were made. It was the duty of the conductor to alight when the train stopped under such circumstances and inspect the trouble. There was also evidence that when employees had to alight at the passing track in Chacra, Colorado, that they considered it more safe to alight on the side away from the track so as to avoid danger from passing trains.

[fol. 215] IN THE SUPREME COURT OF UTAH

JUDGMENT—February 18, 1946

"This case having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, reversed and the cause remanded with instructions to dismiss. Costs to appellant."

IN SUPREME COURT OF UTAH

GROUNDS RELIED UPON BY RESPONDENT IN SUPPORT OF HIS PETITION FOR REHEARING—Filed March 20, 1946

I

This Court has by its opinion herein deprived the plaintiff of a jury trial and has decided this case contrary to

the opinions in controlling cases decided by the Supreme Court of the United States.

II

This Court erred in deciding as a matter of law that the passing tracks between switch points at Chacra were not a place of work.

III

This Court erred in holding that the defendants as a matter of law were not negligent by their omission to provide any means whatsoever to warn their employees of the presence of the unguarded bridge at Chacra or to furnish them with a footing or platform upon which to work.

[fol. 216] IN SUPREME COURT OF UTAH

ORDER DENYING PETITION FOR REHEARING—May 31, 1946

"On consideration of the Petition for rehearing heretofore filed herein and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied."

[fol. 217] IN THE SUPREME COURT OF UTAH

PRAECIPE FOR RECORD—Filed June 28, 1946

To the Clerk of the Above Entitled Court:

Harry O. Pauly hereby designates and requests you to transcribe and certify the following material portions of the record to be incorporated into the transcript of record to be transmitted to the Supreme Court of the United States to accompany the Petition for a Writ of Certiorari in said cause to be filed in said Court by said plaintiff and respondent herein:

(References to "R" are to the page numbers of the Record on appeal from the Third Judicial District Court to the Supreme Court of the State of Utah, said numbers appearing on the lower right hand corner of each page of the Judgment Roll and Bill of Exceptions.)

1. Complaint, filed March 13, 1944, omitting the following portion of the title which was stricken by order of the District Court: "and the Denver and Rio Grande Western Railroad Company, a corporation," and subparagraph A of par. 9 which was stricken by order of the District Court (R. 1 to 6).

2. Answer of the defendant Trustees, filed May 10 1944 (R. 16 to 19).

3. The two forms of verdict submitted to the Jury, filed September 29, 1944 (R. 30 and 31).

4. Defendants' Motion for Directed Verdict filed September 28, 1944 (R. 33 and 34).

5. Entered Order, showing Motion for directed verdict, denial thereof, submission of the case to the jury and verdict, dated September 28, 1944 (R. 28 and 29).

6. Instruction to Jury No. 4 (R. 64).

7. Appellants' exceptions to Instruction No. 4 (R. 448 and 449).

8. The Court's definitions in Instruction to Jury No. 5 (R. 65) of "Negligence", "Ordinary care", "Contributory negligence" and "proximate cause".

9. Instruction to Jury No. 6 (R. 66).

10. Instruction to Jury No. 7 (R. 67).

11. Instruction to Jury No. 9 (R. 69).

12. Appellants' exceptions to Instruction No. 9 (R. 449, 450, 451, 452).

13. Instruction to Jury No. 10 (R. 70).

14. Instruction to Jury No. 11 (R. 71).

[fol. 218] 15. Instruction to Jury No. 12 (72).

16. Appellants' exception to Instruction No. 12 (R. 452).

17. Instruction to Jury No. 13 (R.73).

18. Instruction to Jury No. 17 (R. 77).

19. All of Respondent's exceptions to the Instructions (R. 453, Lines 1 to 9).

20. Judgment on Verdict (R. 58).

21. Notice and Motion for New Trial (R. 83, 84).

22. Minute Entry of Ruling on Motion for New Trial, dated January 22, 1945 (R. 93).

23. Consent to Reduction of Verdict and Order Denying Defendants' Motion For a New Trial, dated January 30, 1945 (R. 95).

24. Entered Order dated January 30, 1945, reducing judgment and denying defendants' Motion for a New Trial (R. 94).

25. Notice of remission of a portion of the verdict and of the overruling of Motion for New Trial, filed January 31, 1945 (R. 96).

26. Notice of Appeal, filed April 28, 1945 (R. 105).

27. Clerk's Certificate (Clerk of the Third Judicial District Court, in and for Salt Lake County), certifying Record on Appeal to the Supreme Court of Utah, dated May 7, 1945 (R. 108).

28. The following portions of the Bill of Exceptions, R. 109.

R. 113 to 424, but omitting:

Lines 1 to 9, and 18, R. 113.
Lines 9 to 26, R. 121.
Lines 1 to 8, and 26, R. 122.
Lines 6, 7, and 10 to 26, R. 123.
Lines 5 to 10, R. 126.
Lines 3 to 13, R. 135.
Lines 7 to 12, R. 147.
Lines 2 to 13, and 25 to 27, R. 148.
Lines 5 to 7, and 17, R. 158.
Lines 5 to 21, R. 160.
Lines 16 to 27, R. 167.
Lines 1 to 19, R. 168.
Lines 25 and 26, R. 169.
Lines 1 to 6, R. 170.
Lines 21 to 26, R. 171.
Lines 15 to 27, R. 172.
[fol. 219] Lines 1 to 21, R. 173.
Lines 14 to 21, R. 176.
Lines 2 and 3, R. 177.
Lines 24 to 27, R. 179.
Lines 17 to 27, R. 180.
Lines 1 to 4, R. 181.
Lines 17 to 22, R. 184.
Lines 10 to 13, R. 189.
Lines 20, 21, 26 and 27, R. 196.
Lines 1, 12 and 13, R. 197.
Lines 17 and 18, R. 200.
Lines 18 to 22, R. 201.
Lines 4 to 27, R. 204.

All of R. 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, and 225.

Lines 20 to 27, R. 229.
Lines 1 to 10, R. 230.
Line 26, R. 244.
Lines 1, 2 and 3, R. 245.
Lines 18 to 25, R. 246.
Line 16, R. 249.
Lines 19 to 24, R. 251.
Lines 2 to 20, and 24, R. 252.
Lines 11 to 27, R. 253.
All of R. 254 to 282, both numbers inclusive.
Lines 1 to 15, R. 283.
Last 4 words on line 7 and Lines 8 to 15, and 23 to 26, R. 286.
Lines 13 and 14, R. 290.
Lines 25 and 26, R. 293.
Lines 13 and 14, R. 294.
Lines 6 to 12, R. 295.
Lines 4 to 16, and 21 to 26, R. 296.
Line 1, R. 297.
Lines 9 to 27, R. 298.
Lines 1 to 3, R. 299.
Lines 3 to 26, R. 300.
Lines 1 to 24, R. 301.
[fol. 220] Lines 15 to 19, R. 302.
Lines 1 to 6, and 12 to 14, R. 304.
Lines 25 to 27, R. 306.
All of R. 307.
Lines 1 to 10, R. 308.
Lines 17 to 25, R. 311.
Lines 18, 19 and 20, R. 312.
Line 3, R. 313.
Lines 12 to 25, R. 314.
Lines 19 to 27, R. 319.
All of R. 320.
Line 1, R. 321.
Lines 13 to 19, R. 322.
Lines 22 to 27, R. 323.
Lines 1 to 5, 7 to 11, 20 to 28, R. 324.
Lines 1 to 5, R. 325.
Lines 18 to 27, R. 327.
Lines 1 to 5, 17 to 28, R. 328.
Lines 1, 2 and 3, R. 329.
Lines 19 to 26, R. 333.
Lines 1 to 9, 19 to 27, R. 334.

Lines 1 to 12, and 27, R. 335.
Lines 11 to 13, and 15 to 24, R. 336.
Line 27, R. 339.
Lines 1 and 2, 10 to 27, R. 340.
Lines 1 to 11, R. 341.
Lines 5 to 11, R. 342.
Lines 10 to 14, R. 344.
Line 16, R. 347.
Lines 18 to 28, R. 348.
Lines 1 to 10, R. 349.
Lines 24 to 28, R. 350.
Lines 1, and 17 to 21 and 28, R. 351.
Lines 1 to 27, R. 352.
Lines 20 to 22, and 28, R. 353.
Lines 1 to 4, R. 354.
Lines 6 to 9, R. 357.
Lines 8 and 9, R. 360.
[fol. 221] Lines 7 to 11, R. 366.
Lines 11 to 23, R. 369.
Lines 2 and 4 to 8, R. 370.
Lines 6 to 25, R. 376.
All of R. 377 to 383, both numbers inclusive.
Lines 1 to 21, R. 384.
Lines 21 to 27, R. 389.
All of R. 390 to 402, both inclusive.
Lines 1 to 10, R. 403.
Lines 26 and 27, R. 408.
R. 409 to 413, both numbers inclusive.
Lines 1 thru the words "comments gentlemen," in Line 20, R. 419.
Lines 1, and 3 to 27, R. 420.
Lines 1 to 15, 17, 18, 26, 27, R. 421.
Lines 1 to 12, R. 422.
Lines 14 to 26, R. 424.

29. Pursuant to the permissive order of the Court, R. 418, Excerpts from the deposition of Mr. Pauly were made a part of the Record on Appeal;

(Title page of the deposition, on page 1, and commencing with the last question on Page 31, to the end of Pauly's deposition, page 44.)

30. Exhibit 3, the light received in evidence, also the red and yellow fusees (R. 414).

31. Exhibits A, B, C, D, E, F, H, K, L, M and each part thereof, and Exhibit Nos. 1, 3 and a standard 10 minute yellow fusee to be hereafter delivered to the Clerk of the Supreme Court of the United States pursuant to stipulation.

32. Order Settling Bill of Exceptions, R. 652, 653 and 654, excepting the words "consisting of" in Line 17 to the end of Line 27, R. 652.

33. Appellants' Statement of Errors Relied on for Reversal, Brief of Appellants, Filed June 27, 1945, Page 6 of Brief.

34. Opinion of Supreme Court of Utah.

35. Judgment dated February 18, 1946, of the Supreme Court of Utah.

(Minute entry on Judgment: "This case having been heretofore argued and submitted and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of the District Court herein be, and the same is, reversed and the cause remanded with instructions to dismiss. Costs to appellant.")

36. Grounds relied upon by Respondent in support of his [fol. 222] Petition for Rehearing. (Petition for Rehearing filed March 20, 1946) Page 2.

37. Order by the Supreme Court of Utah denying Petition for rehearing heretofore filed herein and the arguments of counsel thereupon had, it is ordered that a rehearing be, and the same is, denied.")

The portions of the Record designated herein are intended to constitute the record in the Supreme Court of the United States upon Petition for Writ of Certiorari to be filed by the plaintiff and respondent and for review upon said Writ of Certiorari, if granted. Said portions of the record are all of the material portions thereof necessary to a proper presentation and consideration in the Supreme Court of the United States of the questions presented by the Petition for Certiorari.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Supreme Court concerning Writs of Certiorari and to be

immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated, this 26 day of June, A. D. 1946.

Parnell Black, Calvin W. Rawlings, H. E. Wallace and B. E. Roberts, Attorneys for Plaintiff and Respondent.

Received copy of the foregoing Praecipe this 27th day of June, A. D. 1946.

P. T. Farnsworth, Jr., Dennis McCarthy, W. Q. Van Cott, Attorneys for Defendants and Appellants.

[fol. 223] Clerk's Certificate to foregoing transcript omitted in printing.

NO MISSING PAGES

PUBLISHER'S NOTICE:

Pages are missing due to an error in original pagination; content is uninterrupted.

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Exhibit B—Taken from a point South and West of bridge

Exhibit D—Taken from a point North and West of bridge

Exhibit F—Taken from a point approximately 20 feet West of East end of bridge

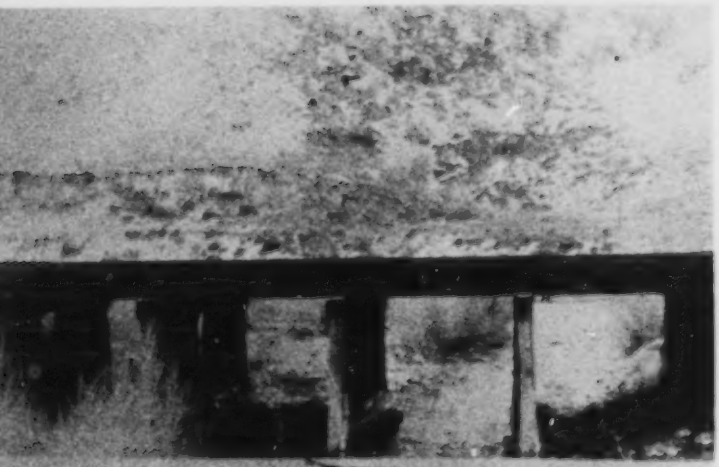


Exhibit E—Taken from a point North of bridge looking down stream

Exhibit K—Taken from a point about 75 yards South of bridge looking up stream toward bridge

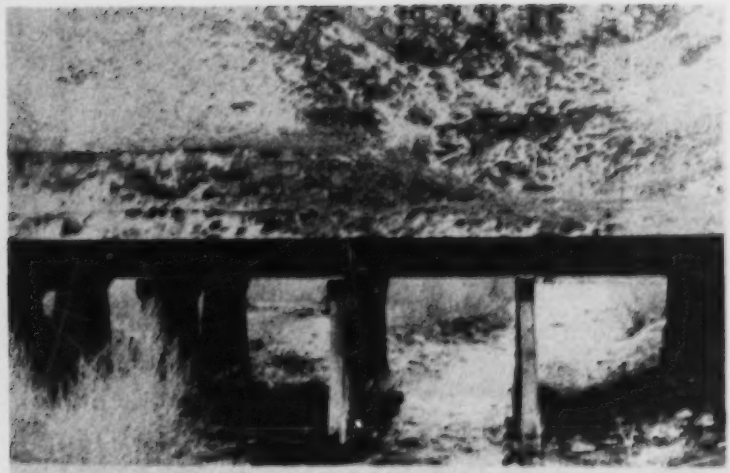
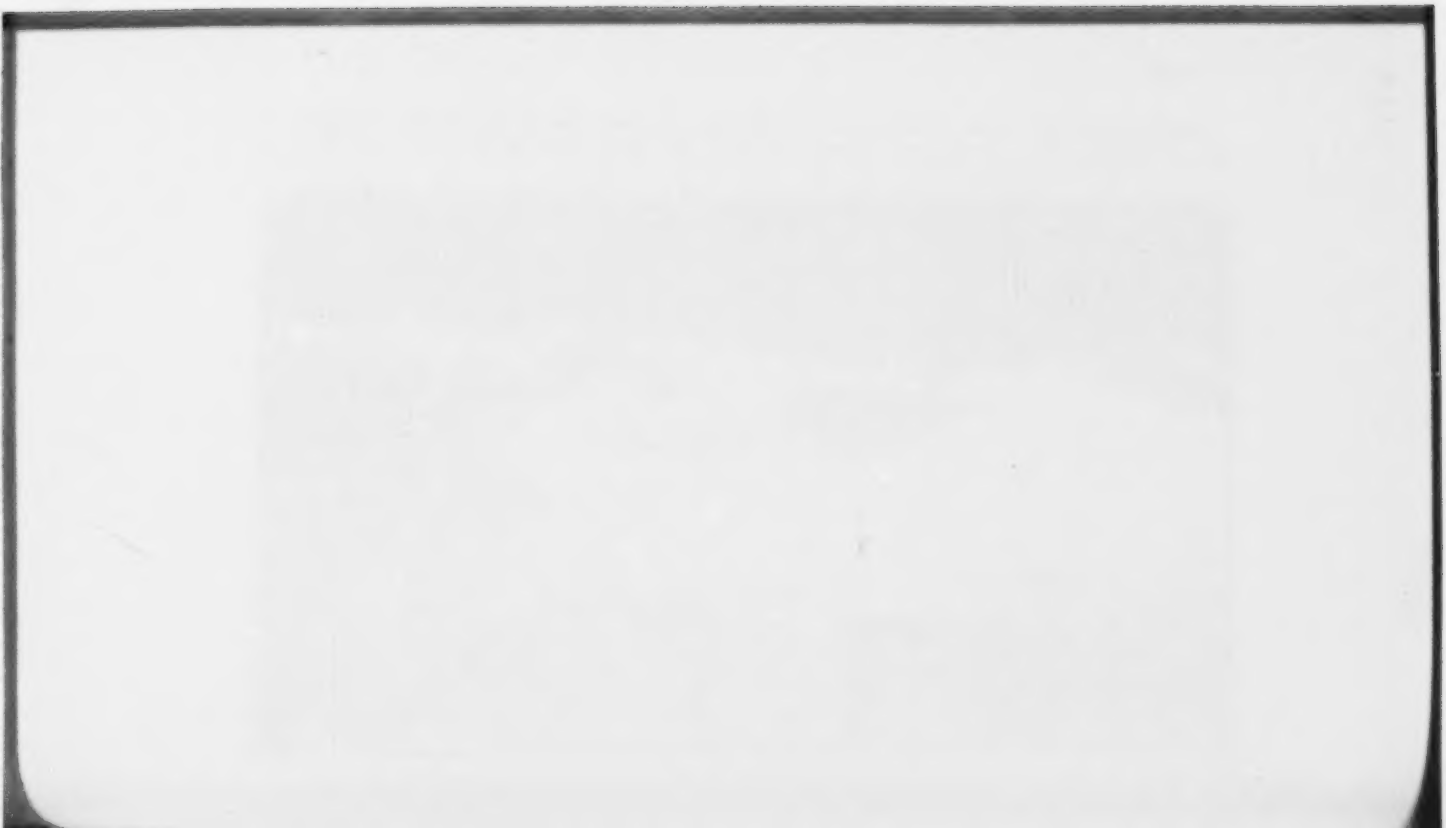


Exhibit L—Taken from a point North of bridge looking down stream

EXHIBIT M

Picture No. 1—Kodak 100 feet South or downstream from Bridge 367.62 showing general construction of bridge and location of stream under bridge

Picture No. 2—Kodak approximately 100 feet North of RR. Bridge 367.62 under Highway Bridge, looking South or downstream showing stream bed and bridge



Picture No. 3—Kodak at South rail of Highway Bridge 100 feet North of RR Bridge shows general view of RR. Bridge 367.62 and stream bed

Picture No. 4—Kodak 50 ft. upstream or North of RR Bridge on West bank of stream

226c

Picture No. 5—Kodak 80 feet Southwest of Bridge on West side of stream shows complete detail of bridge construction and place where Pauly fell, between 2nd and 3rd piers at right side of this picture

226d

Picture No. 6—Kodak 50 feet downstream or South of RR. Bridge looking North or upstream, showing highway bridge in background. 3rd and 4th spans from East end of bridge with stream flow between 4th and 5th piers

226e

215
215

COPY BOUND VERTICALLY

Picture No. 7—Kodak on East bank 20 feet upstream from bridge showing snow and ice on North side of bridge

226f

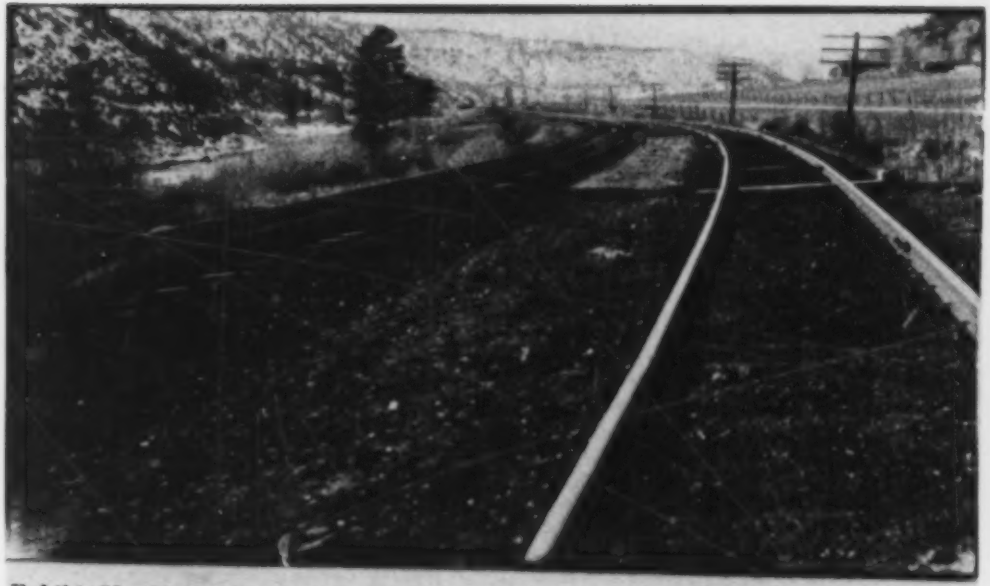
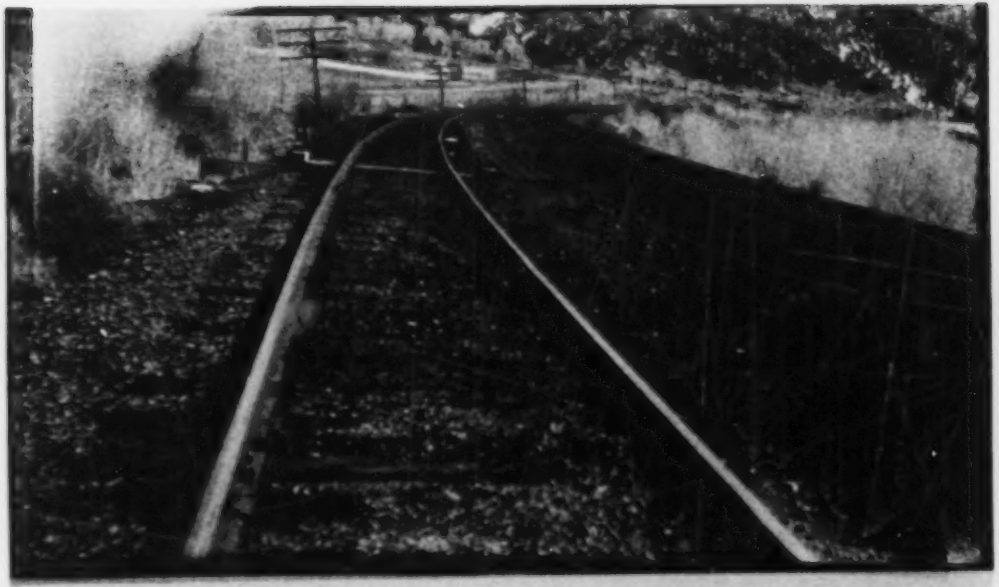
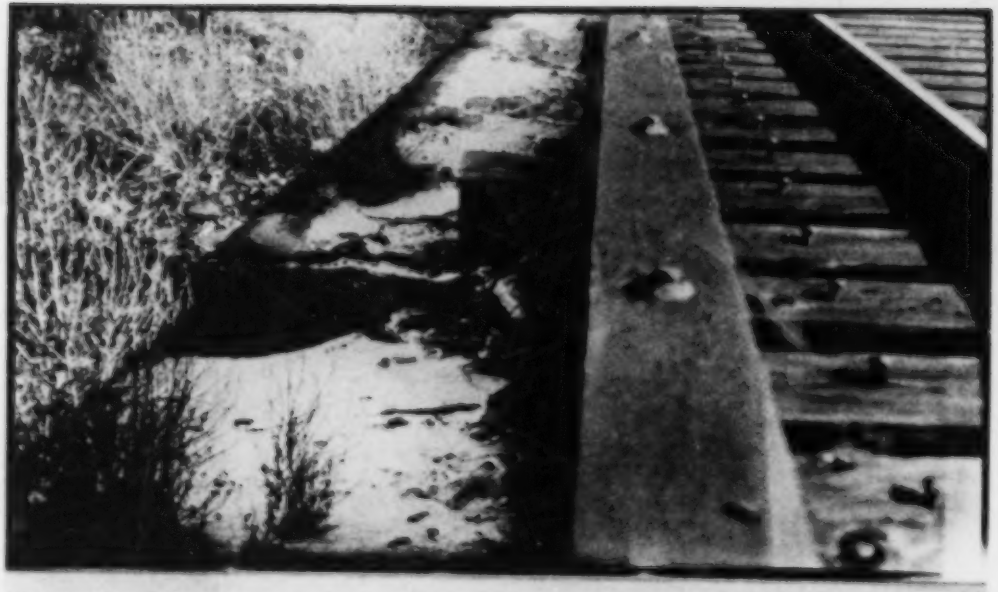


Exhibit M—Kodak 50 feet East of East end of bridge, looking West over bridge and along right of way, showing bridge deck and curve in tracks where they cross this bridge, with walkway in center



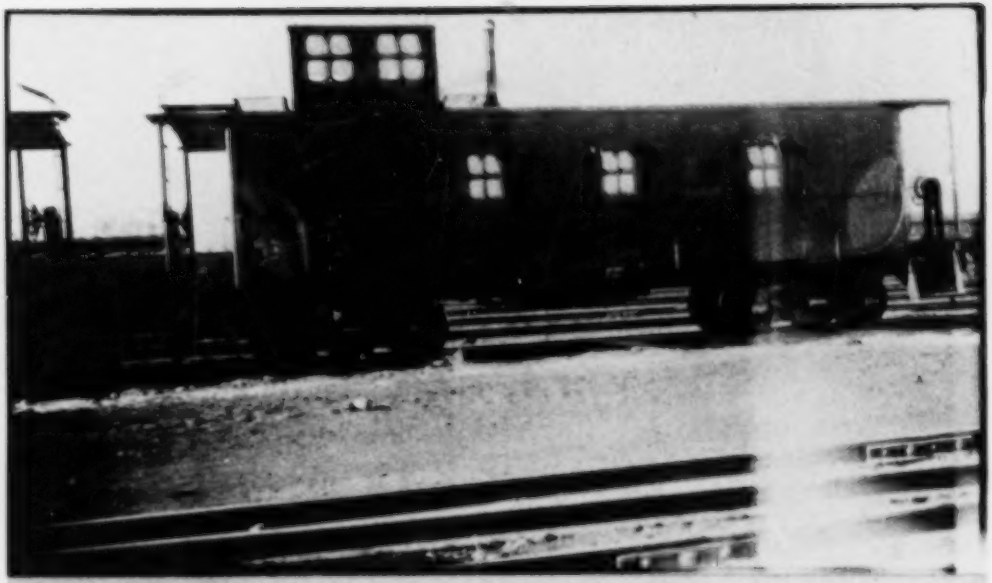
Picture No. 9—Kodak 50 feet West of West end of Bridge looking East along right of way East block signal and switch for Chacra siding in distant background

226h

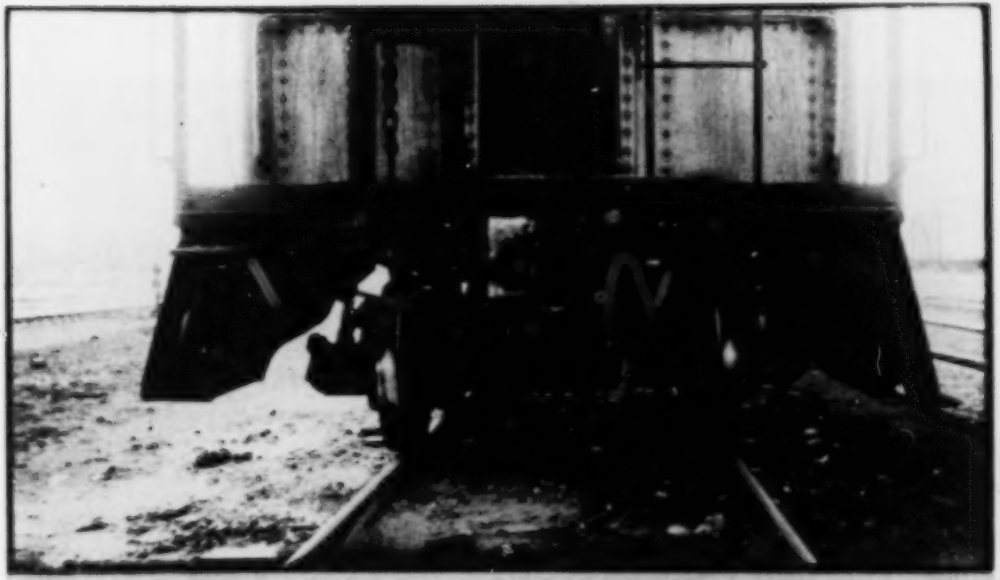


Picture No. 11—Close up showing bridge construction from outside rail to edge of bridge. No surfacing on bridge

2261



Picture No. 12—Caboose 01406 from which Pauly fell showing general construction of this type caboose, type of steps and grab-irons, platforms, etc.



Picture No. 13—Close-up of front end of caboose No. 01406 showing general construction of caboose steps, end view, also shows grabirons

226k

COPY BOUND VERTICALLY

Exhibit 14— Close up of left front step of caboose 01406, showing approximate overhang from rail to outside of step, from which Pauly fell to ground beneath bridge

2261

Exhibit 1—Picture No. 10.—Closeup of walkway between tracks taken from West side of bridge looking East

[fol. 228] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 443

ORDER ALLOWING CERTIORARI—Filed October 14, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Utah is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8115)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 443

HARRY O. FAULX,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of The Davis and Salt Lake Western Railway Company,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

Of Counsel:
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CALVIN W. RAWLINGS
PARNELL BLACK
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330 Judge Building
Salt Lake City, Utah

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No.

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

The petition of HARRY O. PAULY respectfully shows:

Summary and Short Statement of Matter Involved.

The Supreme Court of Utah, by a divided opinion, in a case arising under the Federal Employers' Liability Act, denied petitioner his right of trial by jury in a case where the evidence clearly demonstrated that respondent failed to furnish petitioner, its employee, a reasonably

safe place to work and that such failure proximately contributed to the cause of his injuries and, contrary to the express provisions of the Act and the controlling decisions of this Court, allowed and permitted proof of contributory negligence to defeat recovery in said action.

The trial court submitted the issues of the case to a jury of eight Utah citizens. The jury returned a unanimous verdict awarding petitioner substantial damages, and the trial Judge overruled respondents' motion for a new trial.

Three Justices of the Supreme Court of Utah, over the dissent of two Justices of that Court, set the verdict aside, reversed the judgment and ordered petitioner's case dismissed, the three judges being of the opinion that there was no issue of negligence to submit to the jury because in their judgment the evidence conclusively established, as a matter of law, that respondents were not negligent, that petitioner was negligent, and that his negligence was the sole proximate cause of his injuries.

Petitioner contends that in reaching this result the Utah Court ruled contrary to the principles of law announced by this Court in Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444; Bailey v. Central Vermont Ry. Inc., 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062; Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; Tiller v. Atlantic Coast Line R. Co., 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; Blair v. Baltimore & O. R. Co., 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; Lavender v. Kurn, —— U. S. ——, 66 S. Ct. 740, 90 Adv. Op. L. Ed. 692; Keeton, Administrtrix of Keeton, dec'd v. Guy A. Thompson, Trustee in Bankruptcy for Mo. Pac. R. R. Co., —— U. S. ——, 66 S. Ct. 135, 90 Adv. Op. L. Ed. 57; Cogswell v. Chicago & Eastern Ill. RR. Co., —— U. S. ——, 66 S. Ct. 1122; 90 Adv. Op. L. Ed. 945.

In those cases this Court has held that questions such as decided by the Utah Court, as matter of law, should be submitted to the jury, and that the refusal of trial courts to submit such issues to the jury, or the vacating and setting aside of jury verdicts resting on evidentiary bases by appellate courts is an abdication by such Courts of their sworn duty to guard and protect the right of litigants suing under the Federal Employers' Liability Act to jury trial; that to thus deprive railroad workers of the benefits of this right is to take away a goodly portion of the relief which Congress afforded them.

Jurisdictional Statement.

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A. Section 344.

(b) The Statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on February 18, 1946. It is set forth at (R. 170, 197),is not yet reported in the Utah Reports, but appears at 166 Pac. (2d) 501. The petition for rehearing was denied May 31, 1946 (R. 198). This petition for certiorari was filed August 29, 1946.

Questions Presented.

The question presented is whether the Supreme Court of Utah properly applied the United States Statutes commonly called the Federal Employers' Liability Act, or whether the application made by it is inconsistent and in conflict with applicable decisions of the Supreme Court

of the United States. In a 3-2 decision the Utah Court held, as matter of law, in a case arising under the Act wherein there was no conflict in the evidence, (a) that the place where petitioner and other members of his train crew were working at the time he was injured was not a place to work; when, according to the evidence, respondents' train crews customarily used the place in question for the purpose of inspecting and protecting trains and making temporary running repairs and that petitioner and his fellow crew members in using the place where he was injured as a work place were following well established custom and practice; (b) that there was no duty on respondents' part to exercise care in furnishing their employees a reasonably safe place whereon to perform the usual and ordinary duties required of them in operating, inspecting, protecting, and repairing respondents' trains at the place where petitioner was injured; and (c) that petitioner's conduct was the sole proximate cause of his injuries when as matter of fact this conduct was, as found by the jury, contributory negligence only.

Reasons Relied On For Allowance of Writ.

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. It has set aside a verdict by the jury supported by substantial evidence and reversed the judgment based thereon and ordered the dismissal of petitioner's cause in a case involvoing rights of an employee of an interstate carrier by railroad protected by the Federal Employers' Liability Act. By its decision, the Court has

usurped the functions of the jury contrary to the repeated admonitions of this Court. It has arbitrarily set aside a finding of the jury based upon substantial evidence and proper instructions that respondents were negligent as charged, and that this negligence contributed to the cause of petitioner's injury, and, has allowed, permitted and used proof of contributory negligence to defeat recovery in an action arising under the Act. The Utah Court has thus wrongfully deprived petitioner of his right to a jury trial.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act in Utah, and specifically to determine whether the Utah Supreme Court shall be permitted to continue its policy of frustrating the operation of a Federal Statute and ignoring and refusing to follow the decisions of the United States Supreme Court and other Federal Courts construing it. See *Ehalt v. McCarthy* et al (1943), 104 Utah 110, 138 Pac. (2d) 639.

Prayer.

WHEREFORE, YOUR PETITIONER PRAYS that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled Harry O. Pauly, Respondent vs. Wilson McCarthy and Henry Swan, Trustees of The Denver & Rio Grande Western Railroad Company, Appellants, No. 6846, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court reversed and the judg-

ment of the Third Judicial District Court, in and for Salt Lake County, State of Utah, reinstated herein.

HARRY O. PAULY, PETITIONER,
BY CALVIN W. RAWLINGS,
PARNELL BLACK,

Attorneys for Petitioner
530 Judge Building
Salt Lake City, Utah

OF COUNSEL:
B. E. ROBERTS
HAROLD E. WALLACE
WAYNE L. BLACK
Salt Lake City, Utah

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Courts Below.

The verdict of the jury in Petitioner's favor was rendered on September 28, 1944 (R. 9) and the Judgment of the Court pursuant thereto was rendered on September 29, 1944 (R. 18, 19). The Opinion of the Supreme Court of Utah is set forth at R. 170 to R. 197, is not yet reported in the Utah Reports, but appears at 166 Pac. 2d 501.

Grounds on Which Jurisdiction of Supreme Court of The United States Is Invoked.

The judgment of the Supreme Court of Utah was rendered on February 18, 1946 (R. 197). Petition for rehearing was denied on May 31, 1946 (R. 198). Petition for Writ of Certiorari was filed on August 29, 1946. The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A. Sec. 350.

Statement of the Case.

Petitioner, an experienced conductor, who had been employed by respondents since boyhood and in train service for seventeen years (R. 78, 79), was injured while engaged

in the performance of his duty as conductor by a fall from a train standing on respondents' bridge over North Canyon Creek within switch limits at Chacra, Colorado, at about 11:50 P. M. on the 27th day of January, 1944. (R. 92).

Upon trial of his action brought under the Federal Employers' Liability Act, the jury returned a verdict assessing total damages in the sum of $75,000. (R. 9) $25,000 was deducted for contributory negligence. The trial Court ordered that respondents' Motion for New Trial be granted unless petitioner consent that the verdict be reduced to $34,500.00. (R. 20) He consented and the Motion for New Trial was denied and judgment entered accordingly. (R. 20-21)

Respondents were charged with negligently and carelessly failing to provide petitioner a safe place to work in that they failed to equip the bridge with foot walks and hand rails or to provide lights or markers to indicate its presence and dimensions when they knew that it was the custom and practice of their train crews to stop trains on the tracks at Chacra and on and over said bridge at all times of the day and night and in all kinds of weather for the purpose of inspection and repair and that in darkness said bridge could not be seen or distinguished from its surroundings, and under such circumstances was dangerous and hazardous to respondents' employees; that as a result of such negligence petitioner was caused to fall headlong from the caboose over the edge of said bridge while in the performance of his usual and ordinary duties. (R 2-5)

The freight train upon which Petitioner was working at the time of his injury was a west bound Red Ball freight (R 139) and consisted of eighty-six cars, an engine and caboose. (R. 82) Shortly after leaving Funston, which is six miles east of Chacra, petitioner and the rear-end brake-

man, Ventura, from their position in the caboose, noticed fire flying from the south side of a car fifteen or twenty car lengths forward from the caboose. (R 35, 86) This indicated that brakes were sticking and that the train should be stopped and the difficulty remedied. (R.36, 86). By means of a red fusee displayed from the window of the cupola the engineer was given a signal to stop the train. (R. 36, 70, 86). The fireman also noticed the sparks and fire and so reported to the engineer. (R. 69). The head-end brakeman, from the engine, observed the red fusee, reported the same to the engineer and acknowledged the signal by motion of his lantern. (R. 69). According to custom, the train was not stopped on the main line but was moved onto the tracks at Chacra in order that the necessary inspection and repairs could be made without tying up respondent's railroad. (R. 37, 69, 76, 77, 87, 88). The distance between the east and west switches of the passing track at Chacra is about 6600 feet. A bridge 92 feet long and 26 feet wide, spanning North Canyon Creek, is located approximately 2000 feet west of the east switch. The main line track is south of the passing track; the distance between the center rails of the two tracks is approximately 12 feet; the distance between the south rail of the main line track and the outside extremity of the bridge is two feet, nine inches; the overhang of the ordinary caboose is approximately two feet, six inches; the distance from the top of the rails to the bottom of the creek at the center of the bridge is approximately seventeen feet, nine inches. (R. 23-31, Ex. A. R. 205). There were no footwalks, platform or guard rails on the south side of the bridge. (Ex. A, R. 205, Ex. E, R. 207, Ex. H, R. 208, Ex. M, R. 210, 217). There were no lights or markers to give warning of its location or dimensions. (R. 42, 43, 67, 73, 95). The roadbed in that territory is constructed of black slag and on a dark and stormy night is indistin-

guishable from the darkness of empty space. (R. 34, 67, 68, 84, 85, 92, 96, 142, 143). It is the custom and practice to stop trains on these tracks within switch limits for the purpose of inspection and repair and to permit other trains to pass. (R. 43, 44, 67, 68, 86, 87, 88). In the event difficulties of any kind develop while the train is moving toward Chacra it is the conductor's duty to dismount, proceed to the point of difficulty, inspect and repair it as soon as possible after the train is stopped at Chacra. Petitioner determined that the train should be stopped at Chacra for the purpose of inspection and repair when he first observed the flying fire. (R. 86-88).

Petitioner's crew handled the situation in the usual, typical and customary manner. Although the evidence of the sticking brakes was observed by both the head-end and rear-end crews when the train was several miles east of Chacra, the train was not stopped until it reached that point, so that other trains could pass and the necessary inspection and repair made without tying up the railroad. (R. 68, 69, 88).

The work of train protection, inspection and repair made it necessary for petitioner, the rear-end and head-end brakemen to dismount from the train and pass along and over the territory adjacent to the tracks. (R. 38, 40, 89, 91, 92). Unfortunately the train was stopped when the caboose was standing upon the unguarded and unlighted bridge. (R. 41, 42, 92, 94, Ex. K-R. 209). The night was dark and stormy. (R. 89, 90). Ventura testified that it was "really dark that night." (R. 38). The engineer, Linkins, testified that "It was a black, stormy night, real dark * * *, have to feel your way." (R. 72). "Snow was just beginning to fall." (R. 37, 72). As the train was pulling to a stop, petitioner and Ventura prepared to dismount. At that time an east bound passenger train was passing on

the adjacent tracks. (R. 38, 89). Ventura, pursuant to his duties, alighted from the caboose on the south, rear corner and proceeded back along the tracks to protect the rear end of the train by flagging. He dismounted on the south side, the side opposite and farthest removed from the passing train, in compliance with the Safety Rules and because this was the safe and proper thing to do. (R. 38, 39).

Petitioner likewise prepared to alight from the train on the south side because of the Safety Rules and factors above mentioned (R. 90), and for the additional reason that he had noticed the fire flying from the south side of the train and knew that the trouble to be located and remedied was on the south side. (R. 90, 91, 93). He testified that he "naturally" alighted from this side because it was there he saw the trouble. (R. 91). With lantern and fusee in hand, he stepped upon the steps of the caboose, struck the fusee, glanced down, it was all black and it appearing that he was alighting on the shoulder of the right of way (R. 91, 92, 136, 137), stepped off and because of the nonexistence of a platform or footwalk, fell to the creek bed below, a distance of about eighteen feet (R. 93), and sustained the serious and permanent injuries complained of. Petitioner couldn't see the bridge, he testified. (R. 95, 143): "I didn't see any bridge. It looked to me there was —like the shoulder of the ground. It was all black before me."

Although Ventura alighted from the caboose at the very time it was coming to a stop on the bridge, he did not see it or know that it was there. (R. 54). After he had proceeded some distance back, he looked along the south side of the train and observed the yellow fusee burning in the bottom of the creek. He dropped a red fusee, ran to the bottom of the creek and found petitioner lying there. He asked petitioner how he fell and Pauly stated: "I thought we was past the darned bridge." (R. 40, 51).

Specification of Errors.

1. The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's case.

2. The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured was not a place to work.

3. The Supreme Court of Utah erred in holding as matter of law that defendants were not negligent in the construction, maintenance and use of the bridge at Chacra.

4. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law. (a) In holding that the failure of respondents to properly equip the bridge did not contribute to cause petitioner's injuries; and (b) that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.

ARGUMENT.

Point I.

The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's case.

The verdict of the jury was supported by substantial evidence. The evidence without conflict showed that petitioner was engaged in the performance of his required duties at a place provided by respondents for that purpose at the time he was injured. It further demonstrated that the place was dangerous and unsafe and that there was a very definite causal relationship between the dangerous and unsafe condition of the work place and petitioner's injuries. Therefore, the Court erred in setting aside the verdict and dismissing petitioner's case. The ruling of the Supreme Court of Utah is contrary to and

in conflict with the recent controlling decisions of this Court in the cases cited on page 2 of the Petition for Writ of Certiorari.

Where there is an evidentiary basis to support a verdict the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable. *Lavender vs. Kurn*, 66 S. Ct. 740, 90 Ad. Op. L. Ed. 692.

Questions of negligence under proper charge from the Court should be submitted to the jury for their determination, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact. *Tiller vs. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444.

To deprive railroad workers of the benefits of jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Bailey vs. Central Vt. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury. The jury is the fact-finding body and the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant vs. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

We believe that the procedure adopted by this Court in *Cogswell vs. Chicago & Eastern Ill. R. Co.*, — U. S. —, 66 S. Ct. 1122, 90 Adv. Op. L. Ed. 945, where certiorari was granted and the judgment of the 7th C. C. A. (153 F. 2d 94) setting aside the verdict of the jury in favor of plaintiff on the ground of insufficiency of the evidence was reversed, is justified in the case at bar.

Point II.

The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was injured was not a place to work.

The majority of the Supreme Court of Utah, in holding that the passing tracks at Chacra was not a place to work, amongst other things, stated:

> "The main road was single track. The passing track was one of many on the road to take care of train meets * * *. When there is trouble with the moving equipment on the road and it is possible to reach the passing track at Chacra the train moves in there so as not to hold up traffic. It is a fair inference that such sensible procedure is followed anywhere in single track territory. * * * There is nothing to show that the procedure is any different at the Chacra passing track than at any other passing track when a train in trouble is moved there for inspection and remedy. Indeed, the same sort of inspection and remedy in regard to hot boxes, sticking brakes, break-in-twos, broken air hose might have to be made anywhere on the main line if a passing track could not be reached." (R. 174).

And, continuing:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work. And in fact since repairs, adjustments or temporary improvisations may be necessary anywhere at any time along the main line, the whole main line would then have to be considered as a place to work for train crews engaged in spotting defects in cars or the locomotive which the motion of the train reveals and which interfered with this movement." (R. 174, 175).

After thus finding in effect that the territory within switch limits at Chacra was a place to work, the Court states (R. 177):

"We do not think there is sufficient evidence to go to the jury on the question of whether the passing tracks at Chacra were a place to work."

The evidence on this point was not in conflict. Three witnesses were called and each of them testified that this territory was a place to work and that its usage as a work place by petitioner and his crew at the time of his injury was in keeping with well-established practice.

Ventura testified that it was common practice for trains to stop and to pass one another at Chacra; that when there was trouble with a train a red fusee was displayed and the train stopped in order to make an investigation. (R. 43, 44).

Linkins testified that when anything happens to a train which makes stopping necessary, it is customary to try to stop between switches so as to avoid tieing the railroad up, that when the trains are so stopped the train crew dismounts and attempts to ascertain what the trouble is. The head-end brakeman proceeds back, the conductor proceeds forward until he meets the head-end brakeman, and the rear-end brakeman goes back and flags. (R. 68, 69).

Petitioner testified that in the event of any stop in this territory at night it was the duty of the rear-end brakeman to dismount from the caboose with his flagging equipment and proceed back to protect the rear end of the train; that in the event difficulties of any kind develop while the train is moving, the conductor must go to the point of the difficulty wherever it is as soon as the train is stopped; that when a train is stopped under such conditions, it is the duty of the head-end brakeman to dismount and proceed back along the train toward the rear end, and the duty of the conductor to dismount and proceed forward along the

train to meet the head-end brakeman and if he reaches the point of trouble first to rectify it and signal for the train to proceed. (R. 84, 87, 88).

All of the witnesses testified that this customary procedure was being followed at the time petitioner was hurt. There was no conflicting evidence. The holding of the majority that the tracks and adjacent territory within switch limits at Chacra was not a place to work is not only unsupported, but is contrary to the evidence and to the principles announced by this Court in *Bailey vs. Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062. The railroad employee in that case was fatally injured as a result of falling from an unguarded bridge. This Court held that his employer was required to use reasonable care in furnishing him a safe place to work and, amongst other things, stated:

> "That duty of the carrier is a continuing one from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting and infrequent."

It is difficult to perceive how the Court could possibly find as matter of law that the territory within switch limits at Chacra was not a place to work when the evidence without conflict demonstrated its usage as a work place by respondents' employees over a long period of time and that petitioner and other workmen were actually using it as a work place in the customary and usual manner at the time of the occurrence complained of. The very fact that the train was not stopped on the main line when the trouble was first observed, but the journey continued until the passing tracks were reached, and that each and every member of the train crew understood that this was the proper and customary thing to do indicates that these passing tracks were known and understood to be the place

provided by respondents to stop their trains and make necessary running repairs and inspections. The Utah Court does not discuss the point as to whether or not the making of inspections and repairs is work within the meaning of the phrase "place of work." But we do not believe that disagreement on this point is possible. Likewise, dismounting from trains is work. In order to inspect and repair the train it was necessary for petitioner and the other crew members to dismount. They could not inspect and repair the train from their positions in the caboose and engine. In inspecting and repairing trains it is necessary for the train crew members to pass along the trains over the territory adjacent to the tracks. It is interesting to note that as soon as the train stopped every train crew member, without further orders or instructions, undertook the immediate performance of his usual duties. The head-end brakeman dismounted and started toward the rear end of the train. The rear-end brakeman dismounted and proceeded back to protect the train by flagging. Petitioner was in the act of dismounting preparatory to going forward along the train to the point of difficulty when he fell from the bridge and was injured.

Not only has the Supreme Court of Utah usurped the functions of the jury in determining as matter of law that this territory was not a place to work, but it has made a finding which is contrary to all of the evidence. The reasoning of the Utah Court is interesting. We will not attempt to discuss all of the labored efforts of the Court to justify its conclusion, but will merely direct attention to the remarkable syllogism used by the majority:

> If the passing tracks at Chacra be a place to work then all of the passing tracks on the road are places of work, therefore the passing tracks at Chacra is not a place to work.

Whether or not a certain place is a place to work does not depend upon conclusions reached as a result of mental gymnastics or judicial contortions, but by the simple test of usage. Are employees required to perform any duties under their employment at the place? A place where an employee is required to perform his duties "though fleeting and infrequent" is a place of work and it becomes and is the non-delegable duty of the employer to exercise reasonable care to keep and maintain such place safe as a work place. *Porter vs. Terminal R. Association,* 65 N. E. 2d 31, 327 Ill. App. 645, where an employer was held responsible for the unsafe condition of the premises of a third person, when his employee in the course of his employment was injured while upon said premises as a result of their unsafe condition.

All of the evidence in this case was directed to the usage of the tracks at Chacra as a work place. There was no evidence with respect to any other part or portion of the respondents' railroad. Such proof was deemed irrelevant. The evidence clearly demonstrated that the territory adjacent to the tracks within switch limits at Chacra was customarily used by employees of defendant at all hours of the day and night and in all kinds of weather in dismounting from trains and in passing along, while inspecting and making necessary running repairs. The jury found from this substantial evidence that this territory was in fact a work place, that the bridge was a work place, and that the duty of reasonable care required it to be equipped for safe usage, that this duty had been violated and that such violation contributed to the cause of petitioner's injuries.

A case in point is *Cawman vs. Pennsylvania Reading Seashore Lines,* 110 F. 2d 832, decided by the Third Circuit Court of Appeals in 1940, certiorari denied, 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct. 24. A brakeman fell to his

death when dismounting from a caboose stopped on an unguarded bridge, while engaged in the performance of his duties. Like petitioner here, his personal representative relied on the failure of the employer to furnish a reasonably safe place to work. The Court stated:

> "There was no light, guard rail, or cat walk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think this omission may constitute a breach of the conceded obligation to provide a safe place to work * * *. That obligation assumes as many forms as there are places to work. * * * The provision of mechanical safeguards is more simple than the employment of careful employees. Men are more fallible than machines, one lantern or a few boards and a man's life is saved."

See also *Bly vs. Southern Railway,* 183 Va. 162, 31 S. E. 2d 564, rehearing denied, 183 Va. 406, 32 S. E. 2d 659; *Bimberg vs. Northern Pacific Railway Company,* 217 Minn. 187, 14 N. W. 2d 410, (certiorari denied, 322 U. S. 752, 65 S. Ct. 87, 89 L. Ed. 602; *Rashaw vs. Central Vermont Railway, Inc.,* 133 F. 2d 253 (2 C. C. A. 1943); *Murphy vs. Boston and Maine Railroad,* 65 N. E. 2d 923 (Mass).

It is respectfully submitted that this holding of the Utah Court is contrary to the evidence and the controlling decisions of this Court, and that its effect is to relieve respondents from the duty of furnishing their employees a safe place to work at Chacra.

Point III.

The Supreme Court of Utah erred in holding as matter of law that defendants were not negligent in the construction, maintenance and use of the bridge at Chacra.

The majority of the Utah Court, after holding that the place where petitioner was working when injured was not

a place to work, assumed for the purpose of argument that it was a work place but, that even so respondents were under no duty to maintain it in a reasonably safe condition as such. It is difficult to follow reasoning of this sort. In reaching this strange result the majority fails to determine whether or not the bridge was safe or unsafe as matter of fact or law. Their conclusion is based upon the finding that petitioner failed to exercise due care for his own safety. The Court says:

> "The test of whether appellant in such case was guilty of a negligence of omission is whether it could be reasonably anticipated that Pauly would drop off in the dark without using the means furnished him—in this case a lantern carried with him—to discover the nature of the terrain under him, when there was a walk on the other side safe to alight upon and in the face of a rule which instructed him that 'before getting on or off equipment, employees must look for a safe footing.'" (R. 187, 188).

We are unable to perceive how or in what manner petitioner's conduct could affect the static condition of the bridge or respondents' duty with respect to its safety. If the bridge was a place to work as the Court assumed it to be, it was either safe or unsafe as matter of fact and petitioner's conduct could not in any way change, modify or eliminate the condition whatever it was.

The following excerpts from the opinion further emphasize the confusion of the Court:

> "Only in case where trouble occurred on such place on the line as to permit the train to pull into the passing track at Chacra would there be any need of the conductor alighting. The chance of the caboose stopping on this bridge would depend on where the train stopped and its length. It is obvious that the chances that it would be stopped there as against some other place between the switches of the Chacra passing were

> small. The chances that if it was so stopped on this bridge the conductor would get off or if he did that it would be on the south side of the main track and that he would not at night investigate before he alighted were so remote as to make such mishap only a possibility and not a probability. The employer need not guard against the mere possibility that an employee may start himself solely by his own act on a course of mishap, and make the premises safe against such possibility even granted it is a place to work." (R. 188, 189).

And again:

> "Certainly a prudent railroad could have anticipated that a caboose might be stopped on the bridge. But it could also anticipate that the times it would stop on the bridge would be few compared to the times it would stop off the bridge. But that when it did happen to stop on the bridge that the conductor or other employee would drop down in disregard of ascertaining what was under him when there was a platform on the other side, would be only a remote and only a possible risk which a prudent person would not consider need be guarded against. A neglect to do so cannot be considered negligence." (R. 190).

The majority have thus declared that respondents were not negligent in their use, care and maintenance of the bridge which the jury found upon substantial evidence to be dangerous and unsafe, because, first, petitioner was negligent, and second, the chances of the occurrence of such an accident are relatively small.

It is respectfully submitted that a determination made by such process of reasoning must necessarily be erroneous. In reaching this conclusion the Court disregarded all of the evidence, facts and proper inferences in the case and by indulging in illusive, speculative conjecture as to the probabilities of the happening of such an occurrence and as to what petitioner should have done under the cir-

cumstances finally concludes that respondents were under no duty to maintain the bridge in a safe condition.

There is no escape from the conclusion that respondents not only knew that their train crews customarily used the territory within switch limits at Chacra as a work place, but that they actually required these crews to make such use of said territory. It was not necessary for the majority to assume for the purpose of argument that this territory was a work place. That being true, the solution of the question as to whether or not this work place was maintained in a safe and proper manner depends upon the evidence pertaining to the usage of the territory and its condition at the time of the accident. It appeared without conflict from the map and photographs (Exhibits A, B, D, E, H, M) and from the testimony of witnesses that the bridge was not equipped with footwalks, guard rails, lights or markers; that the roadbed was constructed of black slag and that on a dark and stormy night the bridge was indistinguishable from its surroundings, and that respondents' train crews were required to bring trains to a stop on these tracks at all hours of the day and night and in all kinds of weather, and that when stopped it became and was necessary for trainmen to dismount at the point where the engine or caboose was stopped and to pass along the trains over the territory adjacent to the tracks in the performance of their duties.

Reasonable minds could well foresee the possibility of a trainman intent upon the performance of his duties stepping off a caboose or engine and falling headlong to the bottom of the creek when the caboose or engine was stopped over the bridge on a dark and stormy night. The majority eliminate this factor by holding as matter of law that the chances of such an occurrence are relatively small and that petitioner should have been more careful. By such

process the Court has usurped the functions of the jury, deprived petitioner of his right to jury trial, and relieved respondents from their non-delegable duty of furnishing safe places for their employees to work. It is submitted that if reasonable minds could foresee the possibility of harm to a member of a class in the ordinary usage of the bridge as a portion of a work place, then duty would dictate and require the exercise of reasonable care to avoid the foreseen possibility of harm. We submit that under the doctrine of *Bailey vs. Central Vt. Ry. Co.*, supra, this bridge was a work place and that respondents owed to petitioner and other employees the duty to make it safe. In declaring the law, this court in that case stated:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in federal jurisprudence. * * * As stated by this court in the Patton Case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' * * * It is that rule which obtains under the Employers' Liability Act. * * *"

We believe that reasonable minds will not differ on the proposition that the unguarded bridge at Chacra was much more hazardous than the protruding plank in *Chicago Great Western Railway Company vs. Peeler*, 140 F. 2d 865 (1944--8th CCA) or the umbrella plant in *Haskins vs. Southern Pacific Company*, 3 Cal. App. 2d. 177, 39 P. 2d 895 or the angle iron in *Smith vs. Schumacker*, 30 Cal. App. 2d 251, 85 P. 2d 967, Cert. den. 307 U. S. 646, 83 L. Ed. 1526, 59 S. Ct. 1046, or the spike in *Virginia Railway Company vs. Staton*, 84 F 2d 133 (4th C.C.A.) Yet in all of those cases recovery was allowed. The unguarded bridge

was a permanent fixture, it extended 92 feet along the territory where employees were required to perform the duties of their employment. The plank, umbrella plant, angle iron and spike were temporary and insignificant when compared with this unguarded bridge, the chances of injury from them as compared to the chances of injury from the bridge are inconsequential.

The majority of the Utah Court hold that respondents were not guilty of a violation of duty because they could not be charged with the duty to anticipate the negligence of petitioner. To use their own language: (R. 190)

> "Thus we are referred back to the fundamental question under consideration, viz., whether the appellant owed any duty to the plaintiff under the circumstances in this case. That involves an application of the time-worn principle as to whether the defendant as a prudent person could or should have reasonably anticipated that (1) a caboose would stop on the bridge and (2) that the conductor in the caboose would step off without looking, or, if he looked, would, in seeing nothing but darkness, not use his lantern to reveal the situation under him especially when there was a platform on the north side of the main track on which he could have alighted."

By so construing and considering petitioner's conduct the Utah Court has in effect made contributory negligence a complete defense in an action brought under the Federal Employers' Liability Act, it has thus judicially repealed that portion of the F. E. L. A. which eliminates contributory negligence as a defense in such actions.

From the language of the majority it is apparent that they are not in accord with the holding of this Court in the *Tiller* case, supra. They say (R. 186):

> "It is to be hoped that in industry generally this differentiation between a workman having assumed

> the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law."

Their holding in this case reflects that attitude. They use the outlawed defense of contributory negligence to determine the nonexistence of respondents' negligence and hold that because of petitioner's negligence, respondents owed him no duty to platform or light the south side of this unguarded bridge. The act eliminates contributory negligence as a defense as completely as it eliminates assumption of risk for such purpose.

The majority opinion of the Utah Court indicates that the presence of the flooring between the tracks was, as matter of law a discharge of respondent's duties to its employees, but under the court's own reasoning it was not necessary for respondents to furnish flooring between the tracks or on any other portion of the bridge because the bridge itself was not within or a part of a work place.

Under proper instructions, the jury found that respondents should have reasonably foreseen the likelihood of injury to their employees because of the condition of the bridge; they further found that respondents did not keep this portion of the territory (the unguarded and unlighted bridge) safe either reasonably or at all. In any event, the whole matter was left to the jury to determine as matter of fact. In order to hold the respondents liable, it was necessary under the instructions for the jury to find, and they did find (1) that respondents could reasonably anticipate that petitioner or other employees would alight in the nighttime from the south side of respondent's train while it was on the Chacra bridge, (2) that respondents did not maintain the south side of said bridge in a reason-

ably safe condition, (3) that such failure amounted to a lack of due care and in whole or in part proximately caused petitioner's injuries. (See instruction No. 9, R. 14.)

The verdict certainly rested upon an evidentiary basis and the majority of the Utah Court erred in vacating and setting it aside.

Point IV.

The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

(a) In holding that the failure of respondents to properly equip the bridge did not contribute to cause petitioner's injuries, and

(b) That petitioner was negligent and that such negligence was the sole proximate cause of his injuries.

(a) *The Utah Court erred in holding that the failure of respondents to properly equip the bridge did not contribute to cause Petitioner's injuries.*

The majority hold that the failure of respondents to light or platform the Chacra bridge "would not have caused or contributed to his accident, or put another way, the plaintiff's accident" was "not a contributed result of the lack of a platform to stop him" (R. 190)

This holding on the question of proximate cause is in conflict with *Tennant vs. Peoria and Pekin Union R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409. There the question was whether the failure to give warning of the intended movement of an engine could be found by the jury to be a proximate cause of the death of an employee. The Court said:

> "The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable for * * * death resulting in whole or in part from the negligence of any of the * * * employees."

A jury could reasonably find that the absence of the platform contributed to cause petitioner's injuries. If the platform had been there he would have alighted on it and would not have been injured. Petitioner "would not have been injured" but for the failure to platform the bridge, "but for the failure to warn by lights of the presence of the bridge." A platform "might well have saved" him from injury. Proximate cause is ordinarily a question for the jury. *Lavender v. Kurn*, Supra, *Bailey v. Central Vermont R. R. Co.*, Supra, *Tennant v. Peoria and Pekin Union R. Co.*, Supra.

(b) *The Utah Court erred in holding that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.*

Petitioner's negligence was for the jury. It is submitted that the verdict of the jury on this matter should be accepted just as we believe it should be accepted on the question of respondents' negligence. The majority hold that petitioner was negligent as matter of law because (1) he did not use his lantern or fusee to see what was before him, (2) he acted on the impression that the caboose had passed over the bridge, and (3) he alighted on the south side of the tracks instead of the north side.

The jury found that petitioner was contributorily negligent and therefore reduced his damages one-third. We believe that this matter was properly submitted to the jury and that the Supreme Court was in error in holding that petitioner was negligent as matter of law.

The evidence established without contradiction that the acts of petitioner were in accordance with the practice of railroad workers. As to the ordinary way of dismounting from a train in the nighttime petitioner testified:

> "You look down as you step, you don't make any examination with your light, you have your light in your hand, you just step down, see that it is black and you walk along for footing, you don't take any time to examination." (R. 143).

And again:

> "I never made any examination, with my lantern as to where I was stepping, but just like all railroad men when they are getting on and off of a car, they make a glance. It looked like it was black when I stepped, looked like I was still standing on the right of way." (R. 95, 96).

That he did not make a minute examination and feel his way along did not make him negligent as matter of law. He was acting in the usual and ordinary manner and as other railroad men usually acted. By reason of the darkness of the night and the black roadbed he mistakenly believed the caboose was over solid ground. There was nothing furnished by respondents or anyone else to call his attention to the location of this bridge. He was in the performance of his duties to expedite the movement of his train and he did not make a thorough examination of the roadbed.

He dismounted in accordance with respondents' safety rules, on the side away from passing tracks, and the testimony was uncontradicted that this was the proper side from which to dismount inasmuch as the difficulty to be located and remedied appeared to be on that side and he therefore "naturally" alighted from that side. (R. 90).

That he was under the impression that the caboose had passed the bridge and acted on that impression would not be negligence as matter of law. The majority even admits it was a "very human thing to do." (R. 183). Certainly respondents afforded no warning to dispel that impression. Therein were they negligent.

The Utah Court, not being content with the finding of the jury to the effect that petitioner was negligent, goes further and holds as a matter of law that the negligence of petitioner was the sole proximate cause of his injury. This finding of negligence was employed to support the finding of absence of duty on the part of respondents and thus to become a complete defense to petitioner's action. The Federal Employers' Liability Act expressly eliminates contributory negligence as a defense (*U. S. C. A., Title 45, Sec. 53*). In the very face of this plainly worded statute the majority of the Utah Court held that the contributory negligence of the petitioner barred recovery. They reach this erroneous result by using the simple expedient of calling contributory negligence "sole proximate cause." This Honorable Court denounced this subterfuge in *Grand Trunk Western R. R. Co. vs. Lindsay*, 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838, in the following language:

> "• • • and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendants' negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

This doctrine was reaffirmed in *Tiller vs. Atlantic Coast Line R. Co.*, supra. The holding of the Utah Court on the question of proximate cause is likewise contrary to the decisions of this Court in: *Illinois C. R. Co. vs. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R.*

Co. vs. Hadley, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co. vs. Campbell,* 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683.

The injuries to petitioner resulted from the concurring negligence of respondents and the conduct of petitioner. Both were necessary to produce the end result. The negligence of respondents having contributed to the cause of the injury, the question of proximate cause was properly left to the jury and the majority of the Utah Court erred in substituting its judgment for that of the jury and in setting aside the verdict and dismissing the case.

CONCLUSION

If this divided opinion of the Supreme Court of Utah is permitted to stand, the Federal Employers' Liability Act will not afford railroad workers in Utah the same remedy and protection that it affords in other jurisdictions where the decisions of this Court are respected and followed. It will not do to say in Utah that the decisions of this Court are controling where the interpretation and effect of the Federal Employers' Liability Act is involved, since trial courts usually follow the decisions of their immediate appellate courts. The opinion in this case has been used and is now being used in the trial courts of Utah to defeat the rights of railroad workers to jury trial contrary to controlling principles laid down by this Court. Under the majority opinion there can be no recovery by an injured employee who is guilty of contributory negligence in Utah because the existence of negligence on the part of the railroad is now held to depend on whether or not the railroad can anticipate the employee's negligence and no such anticipation being required, negligence on the part of the railroad cannot

be established. Contributory negligence is called "sole proximate cause" in Utah and liability is denied as matter of law where such negligence exists.

It is respectfully submitted that the opinion of the majority of the Supreme Court of Utah is in conflict with express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act, that a Writ of Certiorari should be granted in order for this Court to review the record and the opinion of the Utah Court and finally reverse the same, and reinstate the judgment of the trial court without the necessity of further briefs, arguments or proceedings.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEE OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF

AN IMPORTANT QUESTION OF LAW IS INVOLVED

Respondents assert on page 2 of their brief that the Supreme Court of the United States, the majority and minority of the Supreme Court of Utah agree upon the controlling legal principles here involved. This statement is misleading and untrue. The majority of the Supreme Court of Utah set aside a verdict in favor of Petitioner, which rested upon an evidentiary basis and thus denied him his right of trial by jury. The majority determined the non-existence of respondent's duty of care by finding that petitioner was negligent, thus permitting contributory

negligence to become a complete defense in an action instituted under the F. E. L. A. This result was accomplished by holding: (1) that respondents were not negligent because petitioner was guilty of contributory negligence, and (2) by labeling petitioner's contributory negligence "sole proximate cause."

It is submitted that the decision of the majority of the Supreme Court of Utah is in direct conflict with the holdings of this Honorable Court in the cases cited by petitioner in his brief in support of Petition for Certiorari. The minority was in harmony with this Court and, therefore, dissented. Respondent's suggestion that there is agreement between the majority and the minority and this Court is ridiculous. The majority of the Utah Court has judicially repealed that portion of the F. E. L. A. which outlaws the defense of contributory negligence, it has denied recognition to the pronouncements of this Court that cases though close and doubtful which rest upon evidentiary bases must be submitted to the jury. Unless certiorari is granted here, the F. E. L. A. will not afford injured railroad employees suing in Utah the protection which Congress intended them to have. A review of this case and a pronouncement by this Court that contributory negligence cannot be given the effect which the majority has here given it and a pronouncement that petitioner's right of trial by jury may not be frittered away by a court after its function has been exhausted, will most certainly add something of substance, value and importance to the body of jurisprudence respecting the F. E. L. A.

RESPONDENTS' STATEMENT OF THE CASE IS MISLEADING

In their statement of the case respondents make many statements which are misleading and unsupported by the record. They make positive misstatements concerning the evidence and quote from a deposition of Petitioner taken long prior to trial as though it were the actual evidence in the case (See Respondents' Brief, pp. 11, 12 and 13). We will not take the time of this Court to point out every misstatement but will mention a few as examples.

Twice on page 4 of their brief, respondents state that petitioner backed off the caboose. This misstatement is repeated on pages 18, 21, 23 and 26. By this statement respondents are evidently attempting to convey the false impression that petitioner came out of the caboose with his face toward the car and his back toward the abyss. Petitioner was an expert trainman of seventeen years experience. He dismounted in the usual, ordinary manner, facing generally toward the West, the direction of the train movement, with the fusee in his left hand and his right hand on the hand rail situated on the west side or end of the caboose (See Pictures, Nos. 12 and 13, Exhibit "M", R. 220 and 221), and with his back toward the caboose. (R. 134, 135).

On page 4 of their brief, respondents state that if petitioner had looked he could have seen there was no footing. This statement is misleading both as matter of fact and principle.

We submit that the existence or non-existence of respondents' duty cannot be determined by a consideration

of petitioner's conduct. The mere fact that petitioner could have discovered the danger and unsafety of the bridge does not alter the fact that it was unsafe as the jury found it to be. The references cited by respondents do not support their statement. These references are to evidence of what others saw under wholly different circumstances. For instance, Linkins testified that he could see the caboose when he was in the creek-bed looking upward, but at that time there was a light in the creek and one in the caboose (R. 74). The Petitioner's testimony that the darkness of space looked like respondents' black slag roadbed at the time he ~~slipped~~ off the caboose is uncontradicted.

On page 4 of their brief, respondents state that petitioner had no work to do on the bridge. This is misleading. It was his duty to repair the sticking brake. To do this it was necessary to dismount from the caboose and walk along the roadbed to the car with the sticking brake. Respondents are evidently of the opinion that dismounting from the caboose and walking along the train was not work. This Court's holding in the recent case of *Anderson v. Mt. Clemens Pottery Co.*, 66 S. Ct. 1187 is, however, to the contrary.

By their presentation of the facts in this case, it is apparent that respondents are seeking to avoid the effect of the well-established rule of law that in determining whether or not a cause should be submitted to the jury, the evidence and inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the plaintiff. *Termial R. Assn. of St. Louis v. Schorb*, 151 F. (2d) 361; *Christensen v. Utah Rapid Transit Co.*, 83 Utah 231, 27 P. (2d) 468.

PETITIONER'S DEPOSITION

On the cross examination of petitioner, respondents endeavored to impeach him with a deposition taken long prior to trial. Respondents now claim that some of the statements made by him at that time were contrary to his testimony at the trial, but that the testimony given in the deposition established the facts to be considered in this proceeding. Inconsistencies between the deposition and evidence given at the trial were matters going to the credibility of petitioner as a witness and were exclusively for the jury. It was for the jury to weigh the evidence and judge credibility. *Tennant v. Peoria & P. U. Railway Company*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Petitioner throughout his cross examination (R. 122, 123, 124) and on redirect examination (R. 138, 139) testified that he had not carefully reviewed the facts and circumstances of his accident prior to the taking of his deposition and that the particulars were not clearly in his mind (all his time had been devoted to getting himself on his feet R. 139), but since that time and before trial he had gone over the case in his own mind and had reached the conclusion that some of the statements made in the deposition were not correct. Respondents contend that petitioner admitted on cross examination that the facts were as stated by him in the deposition. This is not so. Respondents reach this result by selecting certain parts of the cross examination and ignoring the balance of his testimony. This cannot be done. *Sullivan v. Beneficial Life Insurance Co.*, 91 Utah 405, 64 P. 2d. 351, wherein it was stated:

> "The Court is not justified in determining whether a directed verdict should be granted to determine the weight of plaintiff's evidence solely upon selected

parts of the evidence found in cross examination or elsewhere."

It is clear that where there is a conflict between testimony given at a deposition and on the trial, a question of credibility only is presented and that question is one for the jury. *Miller v. Schimming,* 129 Cal. App. 171, 18 P. 2d. 357; *Smarda v. Fruit Growers Supply Co.,* 1 Cal. App. (2d) 265, 36 P. 2d. 701; *Goodman v. Meyers,* 50 Cal. App. 2d. 356, 122 P. 2d 929.

Respondents insist that the statements made by petitioner in his deposition and at the trial were in conflict in two particulars. Throughout their brief they assert that petitioner admitted on cross examination that the statements made in regard to these matters in his deposition were true and that the statements made at the trial were therefore admittedly false. A reading of his entire testimony as given at the trial clearly refutes this contention. In answering questions on cross examination concerning the testimony given by him in his deposition, petitioner was clearly confused. Respondents' counsel admitted this (R. 125), yet he continued to ask the same question, namely, "Was it true?". These questions were confusing. The Petitioner did not know whether respondents' counsel mean't (1) was it true that petitioner had made the statement, or (2) were the statements made in the deposition true, or (3) did petitioner believe the statements true when made. We submit that any fair-minded person, from a consideration of all the testimony given by the petitioner at the trial, would conclude that what he was attempting to state was simply this: "I testified at the deposition in accordance with my best memory and recollection as of that time and I then thought that the testimony given was true, but since

then I have spent much time reflecting upon the occurrence and thinking about the events and the sequence in which they occurred and I have reached the conclusion that I was in error when I stated that I checked the passing train from the rear end of the caboose; as a matter of fact I checked the passing train from the front end of the caboose."

The tenacity and vigor with which respondents' urge their contention on this small matter reveals the fundamental weakness of their whole cause. Whether petitioner checked the passing train from the rear end or the front end of the caboose could not possibly affect the existence or non-existence of negligence on the part of respondents, certainly it could have no effect whatsoever upon the safety or lack of safety of the bridge. It is conceivable that petitioner's position upon the caboose when the passing train was checked might in some way affect the nature and character of his conduct as being negligent or otherwise, but the jury having found that petitioner was negligent and having reduced his damages accordingly, this matter has lost any importance which it may have had in this case. Respondents state that petitioner admitted he did not look as he stepped from the caboose. This statement is misleading, as appears from the following testimony found in the record at pages 133 and 134:

"Q. Did you testify as follows:

Q. Did you look down there before you stepped?

A. No, it was all black to me as if I was on the main line is all on the side of the track.

Did you so testify?

A. I so testified, but if it appeared all black to me as that statement says, I must have looked, didn't I?

Q. Was that answer true?

A. That I made that - - yes, yes."

They state that petitioner admitted that he was on the rear end of the caboose when the passenger train passed. This statement is misleading and the record is contrary to the assertion. Petitioner testified: (R. 126)

"Q. Which part of that answer do you now say was untrue?

A. Oh, I stepped to the rear platform to check the train.

Q. You say that wasn't true?

A. That's right."

THE PLATFORM BETWEEN TRACKS

Respondents, in their brief, avoid meeting petitioner's contention that all of the territory between switches at Chacra was a work place by arguing, as did the majority of the Utah Court, that petitioner could have alighted in safety on the north side of the tracks. They assert that inasmuch as there was a platform over the bridge between the tracks upon which petitioner could have alighted, the bridge was, therefore, safe as matter of law and fact. This argument lends nothing to the solution of the problem presented, except confusion. If the territory between switches at Chacra was a work place, then the dictates of duty required the whole structure to be maintained reasonably safe for its foreseeable use and foreseeable use is

not to be regarded as negligence. Respondents have never argued that dismounting from the south side of a train standing on the main line at Chacra on a dark night would be negligence unless such dismounting happened to be from a car standing on the bridge. It is respectfully submitted that respondents' position therefore must be either (1) that the territory between switches at Chacra is not a place of work as matter of law, or (2) that all of such territory is a work place and must be maintained in a reasonably safe condition for foreseeable use except the bridge, or (3) that all of such territory is a work place and must be maintained in a reasonably safe condition for forseeable use except the south side of the bridge.

It is apparent that respondents are not willing to rest their cause upon the first proposition in view of the evidence and the verdict of the jury. It is equally apparent that the second and third alternatives are untenable. The suggestion that petitioner could have dismounted from the north side in safety is of no relevance if the bridge be not a work place, it amounts to no more than a showing of contributory negligence if the bridge is a work place. Respondents' argument that petitioner could have dismounted in safety from the north side necessarily involves a tacit admission that the jury could well find from the evidence that the bridge was within and a part of a work area. Respondents' argument on this point is purely "hind-sight" argument. Petitioner did not wilfully and knowingly step off the bridge. As the jury found, there were many reasons attributable to the negligence of respondent for petitioner's injuries. If he had known that the caboose was on the bridge and that he was stepping off into space, this accident would never have occurred. Petitioner was possessed of the same

vital instinct of self-preservation that governs the acts of all of us, respondents' argument to the contrary notwithstanding.

LIGHTS AND MARKERS

In support of their contention that the bridge at Charca was safe as matter of law and fact, respondents assert that the record is void of evidence that the absence of lights or markers on the bridge constituted negligence. They argue that the absence of lights or markers can not be regarded as negligence because neither respondents nor other railroads use lights or markers on such bridges. The fallacy of this argument is clearly revealed in the words of Mr. Justice Holmes in *Texas & P. R. Co. v. Behymer*, 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905:

> "What is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

This Court stated in *Northern Pacific R. Co. v. Mares*, 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296:

> "• • • ordinary care • • • is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless."

OTHER BRIDGES

Respondents are in error in their assertion (Respondents' Brief, p. 21) that petitioner makes no contention that there is any evidence that respondents equipped other bridges situated similarly to the bridge at Charca with footwalks and hand rails. The record contains definite,

positive and uncontradicted evidence that all bridges over creeks, gullies and other similar depressions within the switch limits of passing tracks, yards, or stations in the division within which Chacra is located are equipped with footwalks and hand rails and, with one exception, painted white. (See Petitioner's testimony R. 140, 141, 142, 145, 146). The fact that petitioner did not specifically comment on this evidence in his petition or brief does not mean that he has in any way abandoned or overlooked this proof.

THE CASE OF KENNEY V. BOSTON & MAINE R. R., 92, N. H. 495, 33 Atl. 2d. 557

The above case is relied upon by respondents in support of their contention that the petition should be denied (Respondents' Brief, p. 19). The Kenney case is clearly distinguishable from the case at bar. In that case it appeared from the evidence that trainmen had occasion to alight from their trains at switches and at the station only. The locomotive in the Kenney case came to a stop on the bridge for no explainable reason and "no witness could assign any reason for stopping at that point and there is no evidence at all that the business in hand required it." In the case at bar the stop at Chacra was in keeping with usual and customary practice. The stop was made for a purpose necessary and incidental to the prompt and proper handling of the freight train. The tracks at Chacra, amongst other things, were continuously and customarily used for the purpose of making train inspection and incidental running repairs. There is no similarity as far as factual situations are concerned between the case at bar and the Kenny case.

THE CASE OF BOSTON & MAINE R. R. CO. V. MEECH, 156 F. 2d. 109

Had the bridge at Chacra been equipped with footwalk and guard rails and properly lighted it would have been safe for foreseeable use and the injuries to petitioner would never have occurred. These precautions could well have been taken by repondents for the purpose of affording greater safety to their employees.

The above case holds that where further reasonable precautions might have been taken, a question for the jury is made out even though the injured or deceased employee was inattentive to his own safety. The Court states:

> "It may be that the locomotive was being operated in the way usual and customary for the maneuver which resulted in the death of decedent, but nevertheless the fact remains it could have been operated more carefully. Another man could have been assigned to ride with the hosteler to keep a lookout from the fireman's side of the cab or from the rear of the tender for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety, or the whistle on the locomotive could have been sounded as it drew into the wash stand to warn the man assigned there, as decedent had been, to 'strip' it.
>
> • • • • • •
>
> "The defendant might have painted lines on the platforms of its wash stand to indicate the extent to which locomotives overhang them and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its wash stand back from the tracks far enough to prevent locomotives from overhanging them at all.

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' Lavender v. Kurn, supra, 66 S. Ct. 744. Also we think it evident from what we have said that although the decedent could readily have taken more care than he did for his own safety either by standing back from the edge of the platform, or by watching more closely for locomotives coming in from the yard, or by standing on the northerly platform upon which his presence would normally be anticipated and where he would be in the hosteler's range of vision from the engineer's seat, still we cannot say as matter of law that his carelessness was the sole proximate cause of the accident."

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UNDER APPENDIX

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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of The Denver and Rio Grande Western Railroad Company,

Respondents.

BRIEF OF PETITIONER

Opinion of Courts Below

The verdict of the jury in Petitioner's favor was rendered September 28, 1944 (R. 9) and the Judgment of the Court pursuant thereto on September 29, 1944 (R. 18, 19). The Opinion of the Supreme Court of Utah set forth at R. 170 to R. 197, is not yet reported in the Utah Reports, but appears at 166 Pac. 2d 501.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on February 18, 1946 (R. 197). Petition for rehearing was denied on May 31, 1946 (R. 198). Petition for

Writ of Certiorari was filed on August 29, 1946 and granted October 7, 1946 (67 Sup. Ct. 102). The judgment of the Supreme Court of Utah is based upon its application of the United States statute commonly called the *Federal Employers' Liability Act,* 45 U. S. C. A., Secs. 51-59; 35 *Stat.* 65, as amended; 36 *Stat.* 291, and 53 *Stat.* 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the *Judicial Code,* as amended by *Act* of *February* 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A. Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A. Sec. 350. Petitioner claimed in his Petition for Rehearing filed in the Supreme Court of Utah (R. 197-198) and claims here that the Utah Court in holding as matter of law (1) that the place where Petitioner was working when he was injured was not a place to work and (2) that defendants were not negligent in the construction, maintenance and use of their bridge at Chacra, Colorado, and (3) that petitioner's conduct was the sole proximate cause of his injuries, impaired the substantial rights of Petitioner. This raises a federal question.

Garrett v. Moore-McCormack Co., 317 U. S. 239, 87 L. Ed. 239, 63 S. Ct. 246;

St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129, 33 S. Ct. 651;

Great Northern R. Co. v. Leonidas, 305 U. S. 1; 83 L. Ed. 3; 59 S. Ct. 51;

Chicago, etc. R. Co. v. Devine, 239 U. S. 52, 60 L. Ed. 140, 36 S. Ct. 27;

Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. Ed. 671, 35 S. Ct. 306;

Southern Ry. Co. v. Crockett, 234 U. S. 725, 58 L. Ed. 1564, 34 S. Ct. 897;

Norfolk & S. R. Co. v. Ferebee, 238 U. S. 269, 59 L. Ed. 1303, 35 S. Ct. 781.

Statement of the Case

Petitioner, an experienced conductor, who had been employed by respondents since boyhood and in train service seventeen years (R. 78, 79), was injured while engaged in the performance of his duties as conductor by a fall from a train standing on respondents' bridge over North Canyon Creek within switch limits at Chacra, Colorado, at about 11:50 P. M. on the 27th day of January, 1944 (R. 92).

Upon trial of his action brought under the Federal Employers' Liability Act, the jury returned a verdict assessing total damages in the sum of $75,000. (R. 9), $25,000 was deducted for contributory negligence. The trial court granted respondents' Motion for a New Trial unless petitioner consent that the verdict be reduced to $34,500 (R. 20). He consented and the Motion for New Trial was denied and judgment entered accordingly (R. 20-21).

Respondents were charged with negligently and carelessly failing to provide petitioner a safe place to work in that they failed to equip the bridge with foot walks and hand rails, or to provide lights or markers to indicate its presence and dimensions when they knew that it was the custom and practice of their train crews to stop trains on the tracks at Chacra at all hours of day and night and in all kinds of weather for the purpose of inspection and repair and that in darkness the bridge could not be seen or distinguished from its surroundings, and under such circumstances was dangerous and hazardous to respondents' employees; that as a result of such negligence petitioner was caused to fall headlong over the edge of said bridge when he stepped off the caboose in the performance of his usual and ordinary duties (R. 2-5).

The train upon which Petitioner was working at the time of his injury was a west bound "Red Ball" freight (R. 139)

and consisted of eighty-six cars, an engine and caboose (R. 82). Shortly after leaving Funston, which is six miles east of Chacra, petitioner and the rear-end brakeman, Ventura, from their position in the caboose, noticed fire flying from the south side of the train fifteen or twenty car lengths forward (R. 35, 86). This indicated that brakes were sticking and that the train should be stopped and the difficulty remedied, (R. 36, 86). By means of a red fusee displayed from the window of the cupola the engineer was given a signal to stop the train (R. 36, 70, 86). The fireman also noticed the sparks and fire and so reported to the engineer (R. 69). The head-end brakeman, from the engine, observed the red fusee, reported the same to the engineer and acknowledged the signal by motion of his lantern (R. 69). According to custom and practice the train was not stopped on the main line when the trouble was first discovered, but the journey was continued the remaining four or five miles until the passing tracks at Chacra were reached, where the train could be stopped and necessary inspection and repairs made without tying up respondents' railroad. (R. 37, 69, 76, 77, 87, 88).

The distance between the east and west switches of the passing track at Chacra is about 6600 feet. A bridge 92 feet long and 26 feet wide, spanning North Canyon Creek, is located approximately 2000 feet west of the east switch. The main line track is south of the passing track; a space of approximately 12 feet separates the inside rails of the two tracks; the distance between the south rail of the main line track and the outside extremity of the bridge is two feet, nine inches; the overhang of the ordinary caboose is approximately two feet, six inches; the distance from the top of the rails to the bottom of the creek at the center of the bridge is approximately seventeen feet, nine inches (R. 23-31, Ex. A, R. 205). There were no footwalks, platform or guard rails on the south side of the

bridge. (Ex. A, R. 205, Ex. E, R. 207, Ex. H, R. 208, Ex. M, R. 210, 217). There were no lights or markers to give warning of its location or dimensions (R. 42, 43, 67, 73, 95). The roadbed in that territory is constructed of black slag and on a dark and stormy night is indistinguishable from the darkness of empty space. (R. 34, 67, 68, 84, 85, 92, 96, 142, 143). It is customary to stop trains on these tracks for the purpose of inspection and repair and to permit other trains to pass (R. 43, 44, 67, 68, 86, 87, 88). Where mechanical trouble of such nature as not to require an immediate stop is discovered in trains moving toward Chacra it is customary to continue the journey until the train reaches that point. When trains are stopped there following discovery of trouble enroute it becomes the conductor's duty to immediately dismount from the caboose, proceed to the point of trouble and inspect and repair it as soon as possible. When petitioner first observed the flying fire, he, as well as all other members of the train crew, determined that the train should not be stopped until it reached Chacra (R. 86-88).

The work of train protection, inspection and repair made it necessary for petitioner, the rear-end and head-end brakemen to dismount from the train and pass along and over the territory adjacent to the tracks (R. 38, 40, 89, 91, 92). Unfortunately the train was stopped when the caboose was standing upon the unguarded and unlighted bridge (R. 41, 42, 92, 94, Ex. K, R. 209). The night was dark and stormy (R. 89, 90). Ventura testified that it was "really dark that night." (R. 38). Linkins, the engineer, testified, "It was a black, stormy night, real dark . . ., have to feel your way." (R. 72). "Snow was just beginning to fall." (R. 37, 72). As the train was pulling to a stop, petitioner and Ventura prepared to dismount. At that time an east bound passenger train was passing on the

adjacent tracks (R. 38, 89). Ventura, pursuant to his duties, dismounted from the steps located at the south rear corner of the caboose and proceeded back along the track to protect the rear end of the train. He dismounted on the south side, the side opposite and farthest removed from the passing train, in compliance with the safety rules and because this was the safe and proper thing to do (R. 38, 39).

Petitioner likewise prepared to alight from the caboose on the south side because of the safety rules and factors above mentioned (R. 90), and for the additional reason that he had noticed the fire flying from the south side of the train and knew that the trouble to be located and remedied was on that side (R. 90, 91, 93). He "naturally" alighted from this side because it was there he saw the trouble (R. 91). With lantern and fusee in hand, he stepped upon the steps of the caboose, struck the fusee, glanced down, it was all black, and there being no lights upon the bridge to reveal its presence and it appearing that he was alighting on the shoulder of the right of way (R. 91, 92, 136, 137), stepped off and because of the nonexistence of a platform or footwalk, fell to the creek bed below, a distance of about eighteen feet (R. 93), and sustained the serious and permanent injuries complained of. Petitioner couldn't see the bridge, he testified (R. 95, 143): "I didn't see any bridge. It looked to me there was—like the shoulder of the ground. It was all black before me."

Although Ventura alighted from the caboose just before it came to a stop on the bridge, he did not see or know the bridge was there (R. 54). After he had proceeded back some distance, he looked westward along the south side of the train and observed a yellow fusee burning in the bottom of the creek. He dropped a red fusee, ran to the bottom of the creek and found petitioner lying there.

He asked petitioner how he fell and he stated: "I thought we was past the darned bridge." (R. 40, 51).

Petitioner testified that he was acquainted and familiar with the bridges over gullies, creeks, canyons, etc., within switch limits in the division embracing Chacra; that with the exception of the bridge at Chacra, all such bridges were equipped with footwalks and hand rails and with one exception painted white (R. 140-1-2, 145-6).

SPECIFICATION OF ERRORS

1. The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's cause.

2. The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was working when he was injured was not a place to work.

3. The Supreme Court of Utah erred in vacating and setting aside the jury's verdict finding respondents negligent in the construction, maintenance and use of the bridge at Chacra, and in holding that as matter of law respondents were not so negligent.

4. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

SUMMARY OF ARGUMENT

1. THE SUPREME COURT OF UTAH ERRED IN SETTING ASIDE THE JURY'S VERDICT AND DISMISSING PETITIONER'S CAUSE.

The fundamental and most apparent error committed by the Supreme Court of Utah was its failure to consider and decide the issues raised and presented in the light of recent landmark and controlling decisions of this court. The basic principles governing the protection and enforce-

ment of rights arising under the Federal Employers' Liability Act as announced by this Court were completely ignored and petitioner was wrongfully deprived of the benefits awarded him by the jury and trial court.

In its decision the majority disregarded substantial evidence supporting the verdict. The evidence revealed that petitioner, when injured, was engaged in the performance of his required and regular duties at a place provided by respondents for that purpose. The evidence demonstrated that the place was dangerous and unsafe for its foreseeable use and that there was a causal relationship between the dangerous and unsafe condition of the work place and petitioner's injuries.

The testimony supplied an adequate evidentiary basis for the verdict and the holding of the State Supreme Court was therefore contrary to and in conflict with controlling decisions of this Honorable Court.

II. THE SUPREME COURT OF UTAH ERRED IN HOLDING AS MATTER OF LAW THAT THE PLACE WHERE PETITIONER WAS WORKING WHEN HE WAS INJURED WAS NOT A PLACE TO WORK.

There was substantial evidence that the passing tracks and adjacent territory at Chacra, Colorado, was a place to work and that it had been so used for a long time prior to the accident and was being used as a work place by petitioner and other members of his crew according to well-established practice at the time he was injured.

The evidence demonstrated that the crippled train was moved several miles after the sticking brake was discovered in order to bring it to a place where it could be stopped, inspected and repaired without delaying other trains or obstructing the movement of traffic and, as the witnesses said, "without tying up defendants' railroad."

III. THE SUPREME COURT OF UTAH ERRED IN VACATING AND SETTING ASIDE THE JURY'S VERDICT, FINDING RESPONDENTS NEGLIGENT IN THE CONSTRUCTION, MAINTENANCE AND USE OF THE BRIDGE AT CHACRA, AND IN HOLDING THAT AS MATTER OF LAW RESPONDENTS WERE NOT SO NEGLIGENT.

The bridge at Chacra was located within the switch limits of a passing track used by respondents at all hours of the day and night and in all kinds of weather for the purpose of stopping, inspecting and repairing trains as well as for the purpose of permitting trains to pass. The railroad in the division within which Chacra is located is single track and the stopping of trains upon the main line necessarily obstructs and delays other trains. When trouble which does not require an immediate stop is discovered in trains approaching these passing tracks from either direction, the custom is to continue the journey until the passing tracks are reached, where the train can be stopped and necessary inspection and repairs made without delaying other trains or obstructing the movement of traffic. The work of inspection and repair necessarily requires the conductor to dismount from the caboose at the point where it is stopped and proceed forward along the train over the territory adjacent to the track to the point of trouble. It also requires the head-end brakeman to dismount from the locomotive at the point where it is stopped and proceed back along the train to the point of trouble and requires the rear-end brakeman to dismount from the caboose at the point where it is stopped and proceed back along the track to protect the rear end of the train by flagging. Well knowing of the use made of this territory by their train crews, respondents nevertheless failed to make the bridge, which was within and a part of this work

area, safe for its foreseeable use. No foot walks, guard rails, lights or markers were provided. The bridge was dangerous and unsafe to men required to alight from engines or cabooses stopped upon it in the nighttime and was likewise dangerous and unsafe to trainmen required to walk along the south side of trains standing over said bridge in the nighttime while engaged in the work of inspection and repair. The jury found that petitioner was injured because of the unsafe condition of this bridge.

IV. THE SUPREME COURT OF UTAH USURPED THE FUNCTIONS OF THE JURY IN DETERMINING PROXIMATE CAUSE AS MATTER OF LAW.

The jury found upon substantial evidence and proper instructions that the failure of respondents to properly equip the bridge for safe foreseeable use contributed to the cause of petitioner's injuries. The Utah Court held as matter of law that the condition of the bridge did not so contribute, but that the sole proximate cause of petitioner's injuries was his own lack of due care.

There was substantial evidence to the effect that petitioner would not have been injured had the bridge been equipped for safe foreseeable use. The jury found a causal relationship between the failure to equip the bridge for such use and petitioner's injuries. By its holding that as matter of law the sole proximate cause of petitioner's injuries was his own lack of due care, the Utah Court has wrongfully sanctioned the use of contributory negligence as a complete defense in an action arising under the F. E. L. A.

ARGUMENT

Point I.

The Supreme Court of Utah erred in setting aside the jury's verdict and dismissing petitioner's cause.

It becomes apparent from a consideration of the prevailing opinion of the Utah Court that recent controlling landmark decisions of this Honorable Court were ignored and disregarded. The trial Judge at the conclusion of the presentation of evidence denied respondents' motion for a directed verdict (R. 11) and thereby determined that the evidence was sufficient to require submission of the issues of respondents' negligence, proximate cause, and petitioners' contributory negligence to the jury. Eight jurors, on their oaths, found respondents guilty of negligence which in whole or in part proximately caused petitioner's injuries. The trial court denied respondents' motion for new trial and thus held the evidence sufficient to sustain the verdict. Two members of the Supreme Court of Utah were of the opinion that the verdict of the jury rested on an evidentiary basis and should be affirmed but the other three members of that court held that reasonable minds could not differ upon the proposition that the evidence was insufficient to support the verdict.

It is respectfully submitted that the prevailing opinion of the Supreme Court of Utah does violence to controlling decisions of this Honorable Court.

In *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444, 143 A L R. 967, this Court stated:

> "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury,"

and, in *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 87 L. Ed. 1444, 1447, 1448:

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.'

Jacob v. New York, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. That method of determining the liability of the carriers and of placing on them the cost of these industrial accidents may be crude, archaic, and expensive as compared with the more modern systems of workmen's compensation. But however inefficient and backward it may be, it is the system which Congress has provided. *To deprive these workers of the benefits of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.* • • •

"• • • all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue, as well as issues involving controverted evidence. To withdraw such a question from the jury is to usurp its functions."

The prevailing opinion of the Utah Court is the best and most convincing evidence of the stress and strain under which it was produced. Its labored and strange conclusions and syllogisms speak eloquently of the doubts and difficulties which apparently beset the majority in bringing forth the judicial declaration which, up to this point, has defeated petitioner's cause. There is no better proof than the challenged opinion that even in the minds of the majority this is "a close or doubtful case" and, therefore, was properly submitted to the jury.

In reinstating a verdict for plaintiff which had been vacated and set aside by a State Supreme Court, this Court, in *Lavender v. Kurn*, 326 U. S. 713, 66 S. Ct. 740, 90 Adv. Ops. L. Ed. 692, 696, states:

> "• • • The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67-68, 87 L. Ed. 610, 617, 618; 63 S. Ct. 444, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353-354, 87 L. Ed. 1444, 1447, 1448, 63 S. Ct. 1062; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.
>
> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.*" (*Italics ours.*)

The Supreme Court of Utah, disregarding the law as declared in *Tiller v. Atlantic Coast Line R. Co.*, supra, employed the contributory negligence of petitioner to determine the questions of respondents' negligence and proximate cause, contrary to the provisions of the F. E. L. A. In the Tiller case at p. 66 of 318 U. S., p. 617 of 87 L. Ed., this court declared:

> "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon."

The majority of the Utah Court searched and combed the record for evidence, lack of evidence and conflicting circumstances to support the strained conclusion that petitioner was not entitled to a jury trial under the F. E. L. A. Noteworthy efforts were made to demonstrate that the bridge was not within a work area even though it was undisputed that petitioner was actually working there when injured. The majority apparently became satisfied that as matter of law the bridge was safe in whole because there was evidence that it was safe in part.

The jury selected and acted upon the reasonable inference that the passing tracks and adjacent territory at Chacra were used as a place for the inspection and repair of trains and to that extent was a work place. The majority being in disagreement with the jury on the inferences and conclusions selected by it, but apparently unmindful of the oft repeated admonition of this Court that "it is the function of the jury to select from among conflicting inferences and conclusions that which it considers most reasonable," decreed that the verdict must fall. By

judicial choice the majority, overriding the power of selection residing in the jury, made certain controlling inferences. They state:

> "The inference from all the other testimony as to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this use was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line." (R. 177-178)

And, also:

> "Ventura's testimony can hardly be construed to mean that inspections were customarily conducted at Chacra regardless of trouble or that that station was singled out in case of trouble as the one passing track into which the train should customarily proceed in case of trouble, but, if it can be so construed, it must be disregarded as totally at variance with the justifiable inferences of other testimony and at variance with the testimony of what must necessarily be done in cases of emergency." (R. 178)

The act of the Court in thus defeating the right of the jury to choose and select the inferences which to it seemed most reasonable was nothing short of judicial usurpation of the powers and functions of the jury.

In *Tennant v. Peoria & Pekin Union R. Co.*, 321 U. S. 29, 35, 64 S. Ct. 409, 88 L. Ed. 520, 525, this Court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the

> reasonableness of the particular inference or conclusion, drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of the witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

We respectfully submit that the Supreme Court of Utah has in this case failed to construe and apply the F. E. L. A. in accordance with the foregoing controlling decisions; that it abdicated its duty to guard and protect the right of petitioner to a jury trial and usurped the functions of the tribunal chosen by Congress to decide the disputed questions of fact here presented.

Point II.

The Supreme Court of Utah erred in holding as matter of law that the place where petitioner was working when he was injured was not a place to work.

The Supreme Court of Utah, in determining this issue adversely to petitioner, amongst other things, stated:

> "The main road was single track. The passing track was one of many on the road to take care of train 'meets' • • • When there is trouble with the moving equipment on the road and it is possible to reach the passing track at Chacra the train moves in there so as not to hold up traffic. It is a fair inference that such sensible procedure is followed anywhere in single track territory • • • There is nothing to show that the procedure is any different at the Chacra passing track than at any other passing track when a train in trouble is moved there for inspection and remedy. Indeed, the same sort of inspection and remedy in regard to hot boxes, sticking brakes, break-in-twos, broken air hose might have to be made anywhere on the main line if a passing track could not be reached." (R. 174)

And, continuing:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work. And in fact since repairs, adjustments or temporary improvisations may be necessary anywhere at any time along the main line, the whole main line would then have to be considered as a place to work for train crews engaged in spotting defects in cars or the locomotive which the motion of the train revealed and which interfered with this movement." (R. 174, 175).

After thus finding in effect that the territory within switch limits at Chacra was a place to work, the Court states (R. 177):

> "We do not think there is sufficient evidence to go to the jury on the question of whether the passing tracks at Chacra were a place to work."

What is a place to work? The answer is obvious. It is simply a place where one or more persons work. Labored explanation and construction of the phrase is not helpful.

> "There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance."
>
> *St. Louis Iron Mountain & Southern Ry. Co. v. Taylor,* 210 U. S. 281, 295; 28 S. Ct. 616, 621; 52 L. Ed. 1061, 1068.

In the usual course of his employment it was necessary for petitioner to work at the time and place where he was injured. The place was within and a part of an area where the work of dismounting from trains, train inspection and repair was customarily performed. The evidence on this point was not in conflict. Three witnesses were called and each testified that the territory between switches at Chacra was a work place and that its usage as such by petitioner and his crew at the time of his injury was in keeping with well-established practice.

Ventura testified that it was common practice for trains to stop and to pass one another at Chacra; that when there was trouble with a train a red fusee was displayed and the train stopped there in order to make an investigation (R. 43, 44).

Linkins testified that when anything happens to a train which makes stopping necessary, it is customary to try to stop between switches so as to avoid tying the railroad up, that when the trains are so stopped the train crew dismounts at once and attempts to ascertain what the trouble is. The head-end brakeman proceeds back, the conductor forward until he meets the head-end brakeman or reaches the point of trouble and the rear-end brakeman goes back to flag (R. 68, 69).

Petitioner testified that whenever a train is stopped at night on these tracks the rear-end brakeman is required

to dismount from the caboose at once and proceed back to protect the rear end of the train. When trouble, which does not require an immediate stop, is discovered in a train moving toward Chacra the journey is continued until these passing tracks are reached and when the train is stopped there under such conditions, it is the duty of the head-end brakeman to dismount from the locomotive and proceed back along the train and the duty of the conductor to dismount from the caboose and proceed forward along the train to the point of trouble, and repair it if possible. (R. 84, 87, 88).

All of the witnesses testified that this customary procedure was being followed at the time petitioner was injured. There was no conflicting evidence. The holding of the majority that the tracks and adjacent territory within switch limits at Chacra was not a place to work is not only unsupported, but is contrary to the evidence and to the principles announced in *Bailey v. Central Vermont R. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062. The employee in that case was fatally injured by a fall from an unguarded bridge. This Court held that the railroad was required to use reasonable care in furnishing a safe place to work and declared:

> "* * * That duty of the carrier is a 'continuing one' * * * from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

In the Bailey case the unguarded bridge was used about once a year by the defendant's employees and this Court found it to be a work place. In view of this decision how can the opinion of the Utah Supreme Court, holding that as matter of law a place which is continually and customarily used by defendant's employees in the performance of their duties is not a place to work, be affirmed?

The fact that the train was not stopped on the main line when the trouble was first observed, but the journey continued until the passing tracks were reached, and that each and every member of the train crew understood that this was the proper and customary thing to do indicates that these passing tracks were known and understood to be the place provided by respondents to stop trains and make necessary running repairs and inspections. The Utah Court does not discuss the point as to whether or not dismounting from cars or engines, walking along trains, and inspecting and repairing them is work within the meaning of the phrase "place of work," but we do not believe disagreement on this point is possible. In order to inspect and repair it is necessary to dismount. In order to inspect it is necessary to pass along the trains over the territory adjacent to the tracks. Every member of the train crew became aware of the train trouble within a short space of time after its initial discovery and likewise knew that this trouble must be remedied and that this would require work and labor on the part of the train crew. Each man knew that this work must be performed either on the main line or at a more appropriate place, and the conclusion reached by each was that the work should be done at Chacra, the place provided for that very purpose and not on the main line. They knew that it would be improper for them to stop the train on the main line and thereby obstruct the flow of traffic over respondents' single track railroad. They knew that their employer had provided for this and similar occurrences by constructing and maintaining passing tracks where crippled trains could be moved off the main line and the work of inspection and repair performed without delaying other trains. The engine crew never hesitated; the train was moved in on the passing tracks and brought to a stop when the locomotive was some 600 feet to the east of the west switch at Chacra (R. 70).

The engineer did not require the display of stop signals. It is interesting to note that as soon as the train stopped every train crew member, without further orders or instructions, undertook the immediate performance of his usual duties, and in so doing subjected this territory to use as a work place. Ventura dismounted and proceeded back along the track with his flagging equipment (R. 38, 39, 40). Arvis, the head brakeman, dismounted from the locomotive and proceeded back along the train toward the rear end (R. 70, 71). Petitioner was engaged in the act of dismounting from the caboose preparatory to proceeding forward to the sticking brake when injured. To each of these men this area was a work place.

It is respectfully submitted that the evidence was sufficient to provide the required evidentiary basis for the finding that the territory between switches at Chacra was a place to work and being such it was respondents' nondelegable duty to maintain it, including the bridge, in a reasonably safe condition for its foreseeable use.

The Utah Court supports its major conclusion that this territory was not a place to work by considering all of the uses which were not made of it. Such consideration seems idle, useless and impotent. The question is: What were these tracks used for? Not, what were they not used for? The reasoning of the Utah Court in reaching its challenged conclusion is interesting. Time and space will not permit or justify a discussion of all of the labored efforts of the Court, but, in passing, we can not refrain from calling attention to the two remarkable syllogisms employed by the majority in lieu of proof and sound legal reasoning:

> (1) If the passing tracks at Chacra be a place to work, then all of the passing tracks on the road are places of work, therefore, the passing tracks at Chacra is not a place to work.

And

> (2) If the passing tracks at Chacra be a place to work, the respondents' whole main line is a place to work, therefore the passing tracks at Chacra is not a place to work.

It seems sufficient to observe that no proof was offered by either party as to the use made of other passing tracks or the main line. Proof of these matters was regarded by all parties as immaterial and without value. Petitioner assumed that his burden was discharged when proof was produced to the effect that the territory between switches at Chacra was ordinarily and customarily used as a work place and that it was being so used at the time he was injured.

The Utah Court apparently felt that approval of the jury's finding that this territory was a work place would place upon respondents the unduly heavy burden of making all of the territory along the main line as well as that between switches reasonably safe as work places.

This Court long ago, in the case of *St. Louis, I. M. & S. Ry. Co. v. Taylor,* 210 U. S. 281, 295, 28 S. Ct 616, 52 L. Ed. 1061, 1068, denounced this hardship argument in definite and positive language. We quote:

> "• • But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interest of the employee and of the public. Where an injury happens through the absence of a

safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended and to seek some unnatural interpretation of common words."

It is respectfully submitted that the proof was ample to support the inference that frequent stops at Chacra for the purpose of inspection and repair could well be anticipated, thus distinguishing this territory from main line trackage.

The Utah Court states that as far as petitioner's work on the train was concerned the train, roadway and bridge constituted a safe place to work (R. 175-176). In making this remarkable observation the Court is apparently oblivious to the fact that petitioner could not inspect or repair the sticking brake from his position in the caboose.

The Court attempted to distinguish the case at bar from the many cases cited in the opinion where the responsibility of furnishing reasonably safe places for their employees to work was imposed on railroads on the grounds that the work described in those cases was confined to a limited locus or that the employee was employed in switching operations or in giving signals or checking cars, delivering paint, etc. (R. 176-177). This seems a rather

strained and unreasonable limitation. Injury usually occurs at some particular spot or in some limited area. Area limitation as far as petitioner knows has never been regarded as a factor in determining whether or not a certain place was a work place. Certainly it was never so considered by any of the courts in the cases referred to. In the case at bar the point where it became necessary for petitioner to dismount from the caboose and the location of the sticking brake was each confined to a limited locus. So it is apparent that the case at bar cannot be distinguished from those cited by the court on that ground.

The Utah Court loses sight of the controlling importance of what was done by petitioner and other employees at Chacra when it seeks to distinguish authoritative cases on the ground that the employees there involved were performing a different type of work than was petitioner at the time he was injured. The important consideration should be whether work was performed, the type is of no consequence. That switching was not done by crews at Chacra does not alter the fact that the crews were working when they alighted and used the territory adjacent to the tracks in going to and from the points where repairs and inspections were made. It was the duty of the crew to locate and repair the sticking brake and to protect the train by flagging. Dismounting and proceeding to the place where the repairing and flagging was to be done was work to the same extent as the actual repairing and flagging. See *Anderson v. Mt. Clemens Pottery Co.*, 66 Sup. Ct. 1187, 326 U. S. and *Rashaw v. Central Vermont Ry. Inc.*, 133 F. 2d 253 (2 C. C. A. 1943).

The Utah Supreme Court has failed to recognize the effect of the 1939 amendment abolishing the defense of assumption of risk upon cases similar to the one at bar. Prior to that amendment a case founded entirely upon

negligence in failing to furnish a safe place to work could not have been successfully prosecuted by an injured employee, inasmuch as the defense of assumption of risk generally afforded a complete defense to cases of that type.

Miller v. Western Pacific Railroad Company, 73 Utah 442; 274 Pac. 945 (1929);
Laub v. San Pedro L. A. & S. L. R. Co., 47 Utah, 155; 152 Pac. 467 (1915);
Oklahoma City-Ada-Atoka Railroad Co. v. Kirkbride, 179 Okla. 428, 65 Pac. 2d 1021 (1937).

For that reason, prior to the 1939 amendment, actions to recover for injuries sustained in accidents such as exemplified in the case at bar were usually founded upon a charge of negligence of other employees and not upon a failure to furnish a reasonably safe place to work.

This was undoubtedly the situation in the case of *Baltimore & Ohio R. Co. v. Berry,* 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098, a case strongly relied upon by respondents. The plaintiff charged the railroad company with the negligence of its engineer in bringing the train to a stop when the caboose was standing over the trestle and with the negligence of its conductor in ordering the injured brakeman to dismount from the caboose while it was standing on the trestle. No claim or charge was made that the defendant had failed to furnish a reasonably safe place to work and thus the plaintiff was able to avoid the defense of assumption of risk. Cases which follow the Berry case, are distinguishable from the case at bar. The plaintiffs in those cases did not reply upon a breach of the defendant's duty to furnish a reasonably safe place to work, but upon the negligence of fellow employees.

Yazoo & M. V. R. Co. v. Sudduth, 171 Miss. 619, 157 So. 527 (1934), (Cert. Den.) 295 U. S. 748, 55 S. Ct. 827, 79 L. Ed. 1693;

Missouri Pacific R. Co. v. Hathcock, 200 Ark. 294, 139 S. W. 2d 35 (1934),

Marinko v. Chicago M. & St. P. & P. Ry. Co., 63 S. Dak. 256, 257 N. W. 639 (1934),

Davis Agt., v. Shirer, 288 Fed. 293 (1923).

In the case at bar the Utah Court has reached the same result as reached in the above cases even though Congress has obliterated every vestige of the defense of assumption of risk.

The Utah Court places reliance upon the case of *Kenney, Adms. v. Boston & Maine R. R. Co.*, 92 N. H. 495, 33 Atl. 2d 557, 560. An examination of the opinion will show that the decision there does not support the respondent nor the majority of the Supreme Court of Utah. The Court in the Kenney case observes that the locomotive came to a stop on the bridge for no explainable reason and "no witness could assign any reason for stopping at that point and there is no evidence at all that the business at hand required it."

The Court points out that the test of duty to maintain a railroad bridge safe as a work place is one of anticipation and indicates that if the use of the bridge as a work place was foreseeable, it would have been the defendants' duty to keep it reasonably safe for its foreseeable use. All of the findings which actuated the Supreme Court of New Hampshire to hold adversely to the plaintiff in the Kenney case are absent from the case at bar. Here the evidence demonstrated the use of the territory between switches at Chacra including the bridge as a work place and that petitioner was using it according to custom and practice at the time he was injured.

Petitioner relies upon the holding of this Court in *Bailey v. Central Vermont R. Co.*, supra, and *Cawman v. Penn-*

sylvania Reading Seashore Lines, 110 Fed. 2d 832 (3 C. C. A. 1940), *certiorari denied* 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct. 24.

In the Cawman case, supra, a brakeman fell to his death when dismounting from a caboose stopped on an unguarded bridge, while engaged in the performance of his duties. Like petitioner here, his personal representative relied on the failure of the employer to furnish a reasonably safe place to work. The Court at p. 834 of 110 F. 2d, stated:

> "There was no light, guard rail, or cat walk for the protection of those whose duties might require their physical presence on the non-existent flooring. We think this omission may constitute a breach of the conceded obligation to provide a safe place to work
>
> * * *. That obligation assumes as many forms as there are places to work. * * * The provision of mechanical safeguards is more simple than the employment of careful employees. Men are more fallible than machines, one lantern or a few boards and a man's life is saved."

See also *Bly v. Southern Railway Co.,* 183 Va. 162, 31 S. E. 2d 564, rehearing denied, 183 Va. 406, 32 S. E. 2d 659; *Bimberg v. Northern Pacific Railway Company,* 217 Minn. 187, 14 N. W. 2d 410, affirmed 14 N. W. 2d 419, (certiorari denied, 322 U. S. 752, 65 S. Ct. 87, 89 L. Ed. 602); *Rashaw v. Central Vermont Railway, Inc.,* 133 F. 2d 253 (2 C. C. A. 1943); *Murphy v. Boston and Maine Railroad,* 65 N. E. 2d 923 (Mass. 1946).

It is respectfully submitted that this holding of the Utah Court is contrary to the evidence and the controlling decisions of this Court.

Point III.

The Supreme Court of Utah erred in vacating and setting aside the jury's verdict, finding respondents negligent in the construction, maintenance and use of the bridge at Chacra, and in holding that as matter of law respondents were not so negligent.

The majority of the Utah Court, after holding that as matter of law the place where petitioner was working when injured was not a place to work, assumed for the purpose of discussion that it was. They then determine that even so respondents were under no duty to maintain it in a reasonably safe condition for its foreseeable use as such. It is difficult to follow reasoning of this sort. A negative answer was given to the primary question "Was the absence of a walk on the south side of the bridge a defect or insufficiency due to negligence in 'track, roadbed, or works' of defendants?" In returning this answer the Court left undecided the questions: (1) Was the bridge reasonably safe as a work place? (2) Was it negligently maintained in an unsafe condition for its foreseeable use? It can not be determined from the language of the opinion whether the Court decided that respondents were under no duty to maintain the bridge in a reasonably safe condition as a work place or whether it decided that such duty existed but had not been violated. The Court entirely disregards petitioner's charge of negligence upon which his whole case was based, but, on the contrary, creates for his benefit an imaginary charge. We quote:

> "The plaintiff charges the railroad with negligence in failing to provide a safe place to work but in view of the negligence of the plaintiff the charge really amounts to a failure of an alleged duty to place a platform so as to intercept the hapless course of the plaintiff started entirely by his own negligence." (R. 185).

In view of the Court's refusal to directly face and determine the fundamental issues presented by the pleadings and proof, the erroneous results reached are not surprising. The Court bases its findings upon speculation as to (1) the nature and extent of the probable results had petitioner conformed to the standard of care erected for him by the Court, and (2) the improbability of the happening of the event complained of. The Court states:

> "The test of whether appellant in such case was guilty of a negligence of omission is whether it could be reasonably anticipated that Pauly would drop off in the dark without using the means furnished him—in this case a lantern carried with him—to discover the nature of the terrain under him, when there was a walk on the other side safe to alight upon and in the face of a rule which instructed him that 'before getting on or off equipment, employees must look for a safe footing.'" (R. 187, 188)

We are unable to perceive how or in what manner petitioner's conduct could affect the static condition of the bridge or respondents' duty with respect to its safety. If the bridge was a place to work as the jury found and the Court assumed it to be, it was either safe or unsafe as matter of fact and petitioner's conduct could not in any way change, modify or eliminate the condition whatever it was.

The Utah Court held that respondents were not guilty of negligence in the maintenance of the bridge because they could not be charged with the duty of anticipating the negligence of petitioner. Determinations favorable to the respondents were made on the following governing propositions:

> "Thus we are referred back to the fundamental question under consideration, viz., whether the ap-

> pellant owed any duty to the plaintiff under the circumstances in this case. That involves an application of the time-worn principle as to whether the defendant as a prudent person could or should have reasonably anticipated that (1) a caboose would stop on the bridge and (2) that the conductor in the caboose would step off without looking, or, if he looked, would, in seeing nothing but darkness, not use his lantern to reveal the situation under him especially when there was a platform on the north side of the main track on which he could have alighted." (R. 190)

The Utah Court also approved the contention of respondents that petitioner was negligent as matter of law and that his negligence was the sole cause of his injuries. The Court states:

> "But here the mishap was initiated entirely by the negligence of the respondent not assisted nor contributed to by the appellant. * * * The respondent, under the spell of the impression that he was across the bridge, intentionally left a position which was safe without taking proper precautions to ascertain the nature of the footing below him and dropped into space, starting himself on the career of disaster." (R. 187)

The Court entirely overlooked the simple obvious fact that it would have been impossible for plaintiff to step from the caboose over the edge of the bridge had it been equipped with footwalk and guard rail. Petitioner fell and was injured because of the concurrence of his own conduct and that of the respondents in subjecting him to the dangers of the bridge. The bridge was dangerous because it was improperly constructed and maintained for its foreseeable use as a work place and therein lies the delect of respondents.

By so construing and considering petitioner's conduct the Utah Court has in effect made contributory negligence a complete defense in an action brought under the Federal Employers' Liability Act, it has thus judicially repealed that portion of the F. E. L. A. which eliminates contributory negligence as a defense in such actions.

From the language of the majority it is apparent that they are not in accord with the holding of this Court in the *Tiller* case, supra. They say: (R. 186)

> "It is to be hoped that in industry generally this differentiation between a workman having assumed the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law."

Their holding in this case reflects that attitude. They use the outlawed defense of contributory negligence to determine the nonexistence of respondents' negligence and hold that because of petitioner's negligence, respondents owed him no duty to platform or light the south side of this unguarded bridge. The act eliminates the defense of contributory negligence just as completely as it does the defense of assumption of risk.

The Utah Court avoids the obvious fact that the bridge was but a part of the territory between switches at Chacra and subject to the same usage and duty of care as the balance thereof. In determining whether or not the bridge was negligently maintained it cannot be disassociated from the remaining territory there. If a jury could properly find (as one did in the case at bar) that the whole of said territory was a work place, then it would necessarily follow that the bridge, being a part of a work area, should be

maintained in a reasonably safe condition for its foreseeable use. That being true, the duty with respect to its care and maintenance depends upon reasonable anticipation of harm to employees using this territory in the work of train protection, inspection and repair.

The jury found that respondents could reasonably foresee that trainmen intent upon the discharge of duty in the nighttime would alight from the south side of trains standing upon the bridge and for lack of lights, markers, footwalks and guard rails fall to the creek bed below.

Reasonable minds could well regard the bridge as dangerous to these men. Why did petitioner refer to it as a "darned bridge?" The answer is obvious. The bridge was a recognized source of danger. In the daytime when its existence and dimensions were plainly visible it was not dangerous, but on dark and stormy nights the bridge, like a trap skilfully set and skilfully concealed, became and was dangerous and hazardous.

It is a fair inference from the evidence that respondents not only knew that their train crews customarily used the territory between switches at Chacra as a place to inspect and make temporary train repairs but that they expected their train crews to make such use of said territory in order to avoid obstruction of traffic and delay of trains.

It is apparent from the evidence and testimony that respondents' trainmen were subjected to danger and hazard in the performance of their duties at Chacra by reason of the condition of the bridge.

It appeared without conflict from the map and photographs (Exhibits A, B, D, E, H, M, R. 205-219) and from the testimony of witnesses that the bridge was not equipped

with footwalks, guard rails, lights or markers; that the roadbed was constructed of black slag and that on a dark and stormy night the bridge was indistinguishable from its surroundings, and that respondents' train crews in the ordinary and usual performance of their duties were required to bring trains to a stop on these tracks at all hours of the day and night and in all kinds of weather, and that when stopped it became and was necessary for trainmen to dismount at the point where the engine or caboose was stopped and to proceed along the trains over the territory adjacent to the tracks.

Reasonable minds could well foresee the possibility of a trainman intent upon the performance of his duties stepping off a caboose or engine and falling headlong to the bottom of the creek when the caboose or engine was stopped over the bridge on a dark and stormy night. As heretofore pointed out the majority of the Utah Court eliminates this factor by holding that as matter of law petitioner should have been more careful and that the chances of such an occurrence were relatively small. By such process the Court has usurped the functions of the jury, deprived petitioner of his rights to jury trial, and relieved respondents of their non-delegable duty to furnish safe places for their employees to work. We submit that under the doctrine of *Bailey vs. Central Vt. Ry. Co.*, supra, this bridge was a work place and that respondents owed petitioner and other employees the duty to make it safe. In declaring the law, this court in that case at pp. 352-3 of 319 U. S., p. 1447 of 87 L. Ed., stated:

> "At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * That rule is deeply engrained in federal jurisprudence. * * * As stated by this court in the Patton Case it is a duty which be-

> comes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' • • • It is that rule which obtains under the Employers' Liability Act. • • •"

We believe that reasonable minds could not differ on the proposition that the unguarded bridge at Chacra was more hazardous than the protruding plank in *Chicago Great Western Railway Company vs. Peeler,* 140 F. 2d 865 (1944-8th C. C. A.) or the umbrella plant in *Haskins vs. Southern Pacific Company,* 3 Cal. App. 2d 177, 39 P. 2d 895 (1935) or the angle iron in *Smith vs. Schumacker,* 30 Cal. App. 2d 251, 85 P. 2d 967, Cert. den. 307 U. S. 646, 83 L. Ed. 1526, 59 S. Ct. 1046 or the spike in *Virginian Railway Company vs. Staton,* 84 F. 2d 133 (4th C. C. A.). 1936. Yet in all of those cases recovery was allowed. The unguarded bridge was a permanent fixture, it extended 92 feet along the territory where employees were required to perform the duties of their employment. The plank, umbrella plant, angle iron and spike were temporary and insignificant when compared with this unguarded bridge. The chances of injury from them as compared to the chances of injury from the bridge are inconsequential.

The authorities abundantly support the proposition that carriers must keep the territory along tracks where employees may be required to alight from cars, engines or other equipment in a reasonably safe condition for such purpose. See *Chicago, Great Western Railway Company v. Peeler,* supra; *Haskins v. Southern Pacific Company,* supra; *Smith v. Schumacker,* supra. In the Haskins case, supra, at page 897 of 39 Pac (2), the Court stated:

> "• • • there are numerous cases in which liability for negligence has been imposed upon railroad companies for injuries caused by obstructions • • • which were allowed to remain on rights of way in places where employees were required to work."

That this duty required respondents to keep both sides of the tracks between switches at Chacra in a reasonably safe condition is supported by the decision in *Thompson v. Boles,* 123 F. (2) 487, 492, (8 C. C. A. 1941), Cert. Den. 315 U. S. 804, 86 L. Ed. 1204, 62 S. Ct. 632, wherein the Court states:

> "The duty to exercise reasonable care in furnishing a safe place to work did not pertain to any particular area on this walkway. As stated in Kenmont Coal Co. v. Patton, 6 Cir., 268 F. 334, 336, 'Defendant's duty with respect to furnishing decedent a safe place to work was not necessarily confined to the precise spot in which decedent was to work.' "

It is submitted that the respondents themselves established a standard for the construction and maintenance of bridges located as was the bridge at Chacra, and that they themselves failed to construct, equip and maintain the bridge at Chacra according to their own standard of care. Petitioner testified and his testimony was uncontradicted that he was familiar with the bridges over gullies, creeks, canyons, etc., within switch limits in the division embracing Chacra. That with the exception of the bridge at Chacra all such bridges were equipped with foot walks and hand rails and with one exception painted white (R. 140-1-2, 145-6).

The Utah Court takes the position that inasmuch as there was a platform over the bridge between the tracks the bridge was, therefore, safe as matter of law and fact. This argument lends nothing to the solution of the problem presented except confusion. If the territory between

switches at Chacra was a work place, then the dictates of duty required the whole of it to be maintained reasonably safe for its foreseeable use. No contention has ever been made that dismounting from the south side of a train standing on the main line at Chacra on a dark night would constitute negligence except perhaps when the act of dismounting was from a car standing on the bridge. It is respectfully submitted that the Utah Court's position on this matter, therefore, must be either (1) that the territory between switches at Chacra is not a place of work as matter of law, or (2) that all of such territory is a work place and must be maintained in a reasonably safe condition for foreseeable use except the bridge or (3) that all of such territory is a work place and must be maintained in a reasonably safe condition for foreseeable use except the south side of the bridge.

Contrary to the evidence the Utah Court found as matter of law that this territory was not a place of work, but, evidently feeling insecure in its position on this point, assumed it to be a work place and then attempted to demonstrate that the bridge was not negligently maintained in an unsafe condition for its foreseeable use because of the platform between the tracks. It is apparent that the second and third alternatives above mentioned are untenable. The suggestion that petitioner could have dismounted from the north side in safety is of no relevance if the bridge be not a work place. It amounts to no more than the showing of contributory negligence if it is a work place.

If the bridge is a work place as the jury found it to be, then it should require no argument to demonstrate that the duty of making it safe for foreseeable use could not be discharged by maintaining a portion of it only in a safe condition. To argue that petitioner could have dismounted

in safety from the north side necessarily involves a tacit admission that a jury could well find from the evidence that the bridge was within and a part of a work area. The Court overlooked the fact that petitioner did not wilfully and knowingly step off the bridge. As the jury found, there were many reasons attributable to the negligence of respondents for his injuries. He is certainly entitled to the benefit of the familiar presumption that he would not knowingly and wilfully indulge in conduct calculated to bring serious physical injury to himself. If he had known that the caboose was on the bridge and that he was stepping off into space this accident would never have occurred. Petitioner is certainly possessed of the same vital instinct of self-preservation which governs the acts of us all, the suggestions in the opinion of the Utah Court to the contrary notwithstanding.

If safety of trainmen dictated the placement of the platform between the tracks as contended by respondents and suggested by the Utah Court, then such consideration should likewise have suggested the placement of platforms on the outside of the tracks. It is clear from the evidence that in keeping with respondents' rules and established custom and practice trainmen would be expected to alight from trains more frequently upon the side away from the passing tracks. The rule requiring and the custom of dismounting on the side of the train away from passing tracks or passing trains establish this to be so.

If the foreseeability of harm or danger to employees using the track and road bed between switches at Chacra as a place to work is an important factor in determining respondents' duty of care with respect to the bridge, then the respondents should certainly be charged with the duty of making safe the south side of the bridge inasmuch as respondents would be charged with the reasonable ex-

pectation that the south shoulder of the track would be used to alight upon more frequently than the north shoulder. That duty could not be discharged by rendering safe the north side of the bridge, the side less frequently used by trainmen for such purpose. If the foregoing is true, and we submit it is, then the provision of the platform between tracks does not obviate or excuse the failure to platform and make reasonably safe the south side of the bridge.

Under proper instructions, the jury found that respondents should have reasonably foreseen the likelihood of injury to their employees because of the condition of the bridge; they further found that respondents did not keep this portion of the territory (the unguarded and unlighted bridge) safe either reasonably or at all. In any event, the whole matter was submitted to the jury for determination as matter of fact. In holding the respondents liable, it was necessary, under the instructions, for the jury to find, and it did find (1) that respondents could reasonably anticipate that petitioner or other employees would alight in the nighttime from the south side of respondents' train while it was on the Chacra bridge, (2) that respondents did not maintain the south side of said bridge in a reasonably safe condition, (3) that such failure amounted to a lack of due care and in whole or in part proximately caused petitioner's injuries. (See Instruction No. 9, R. 14).

The Utah Supreme Court meets this proposition by minimizing the chances of the happening of the event complained of. They state:

> "Only in case where trouble occurred on such place on the line as to permit the train to pull into the passing track at Chacra would there be any need of the conductor alighting. The chance of the caboose stopping on this bridge would depend on where the train

> stopped and its length. It is obvious that the chances that it would be stopped there as against some other place between the switches of the Chacra passing were small. The chances that if it was so stopped on this bridge the conductor would get off or if he did that it would be on the south side of the main track and that he would not at night investigate before he alighted were so remote as to make such mishap only a possibility and not a probability. The employer need not guard against the mere possibility that an employee may start himself solely by his own act on a course of mishap, and make the premises safe against such possibility even granted it is a place to work." (R. 188, 189).

And again:

> "Certainly a prudent railroad could have anticipated that a caboose might be stopped on the bridge. But it could also anticipate that the times it would stop on the bridge would be few compared to the times it would stop off the bridge. But that when it did happen to stop on the bridge that the conductor or other employee would drop down in disregard of ascertaining what was under him when there was a platform on the other side, would be only a remote and only a possible risk which a prudent person would not consider need be guarded against. A neglect to do so cannot be considered negligence." (R. 190).

The approval of reasoning of this character would provide judicial justification for extreme neglect in the care and maintenance of yards and switch tracks. If this process of reasoning is legally sound a railroad company may, in safety to itself, entirely disregard its duty to keep and maintain yards and roadbeds in a reasonably safe condition for foreseeable use as a work place. It could successfully resist claims for injury and damage sustained by switchmen and trainmen stumbling and falling over

ties, boulders, clinkers, angle irons and other objects permitted to remain upon the tracks and roadbed upon the fallacious ground of extreme improbability of the happening of the event. The company could well say, as the Utah Supreme Court in effect has said,

> "The chances of our trains stopping near these objects are remote. The chances of our employees being injured as a result of these conditions are more remote. The chances that our employees will fail to discover the dangers incident to these conditions are still more remote and, therefore, we should as matter of law be absolved from all responsibility for our neglect,"

thus defeating the very purpose of the Federal Employers' Liability Act.

It is interesting to note the extreme liberality (as far as respondents are concerned) with which the Court views the conduct of the respondents. Let us suggest the use of the same standard in viewing the conduct of petitioner. Assume that he was conscious of the fact that the bridge was unlighted and unguarded, but in the performance of his duties he figured that the chance of the caboose being stopped over the bridge was nothing more than a mere possibility inasmuch as there was 6500 feet of shoulder along the track between switches where the caboose could be stopped without being over the bridge and only 92 feet of space where it could be stopped when over the bridge. Being thus assured of his safety he dismounted without thinking or looking, and fell to the creek bed and was injured. By using the Court's reasoning in determining whether or not he was negligent, he suggests that his chances of alighting on solid ground were excellent and very much greater than the chances of falling into the creek, in fact 65 to 1, and that because of the extreme improbability of

stepping off the caboose at a time when it was standing on the bridge and the slight possibility of harm involved any lack of care on his part would be unworthy of consideration by the Court or anyone else and, therefore, as matter of law he could not be negligent. Certainly the reasoning should work both ways.

We submit that the recent case of *Boston & M. R. R. v. Meech*, 156 F. 2d 109, 111, (1 C. C. A. 1946) (Certiorari denied October 28, 1946, 15 L. W. 3171, not yet officially reported) announces the proper rule to be used in determining whether a case involving failure to furnish a reasonably safe place to work should be submitted to a jury. In that case the employee was killed by an engine backing into him while he was working on a platform adjacent to the tracks. Plaintiff relied upon the failure of the defendant to furnish the employee a reasonably safe place to work. The Court held that the evidence clearly supported a verdict based upon such failure and stated:

> "The defendant might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them, and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to prevent locomotives from overhanging them at all.
>
> "From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' Lavender v. Kurn et al., supra, (66 S. Ct. 744)."

In the case at bar the respondents could have taken further precautions to make the bridge at Chacra safe by placing either lights or markers, or guard rail and platform on the south side. Under the Meech case their failure so to do furnished an evidentiary basis for the verdict of the jury.

It is respectfully submitted that the verdict of the jury finding respondents negligent in the construction, care and maintenance of the bridge as a place to work was supported by substantial evidence and that the Utah Court committed reversible error in holding as matter of law that respondents were not negligent in the construction, maintenance and use of the bridge.

Point IV.

The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

(a) By holding that the failure of respondents to properly construct, equip and maintain the bridge did not contribute in whole or in part to cause petitioner's injuries, and

(b) By holding that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.

(a) *The Utah Court erred in holding that the failure of respondents to properly construct, equip and maintain the bridge did not contribute, in whole or in part, to cause petitioners' injuries.*

The majority hold that the failure of respondents to light or platform the Chacra bridge "would not have caused or contributed to his accident, or put another way,

the petitioner's "accident" was "not a contributed result of the lack of a platform to stop him." (R. 190)

This holding on the question of proximate cause is in conflict with *Tennant vs. Peoria and Pekin Union R. Co.*, supra. There the question was whether the failure to give warning of the intended movement of a train could be found by the jury to be a proximate cause of the death of an employee. The Court at p. 34 of 321 U. S., p. 524 of 88 L. Ed., said:

> "The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable 'for * * * death resulting in whole or in part from the negligence of any of the * * * employees.'".

A jury could reasonably find that the absence of the platform contributed to the cause of petitioner's injuries. If the platform had been properly installed on the bridge, petitioner in all probability would have alighted on it and escaped injury. "The ultimate inference that" petitioner "would not have been" injured "but for the failure to" platform the bridge or to warn of its presence by lights or markers "is therefore supportable." A platform, guard rails, lights or markers "might well have saved him from harm." Proximate cause is ordinarily a question for the jury. *Lavender v. Kurn*, supra, *Bailey v. Central Vermont R. R. Co.*, supra, *Tennant v. Peoria* and *Pekin Union R. Co.*, supra. *Illinois C. R. Co. vs. Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R. Co. vs. Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co., vs. Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683,

(b) *The Utah Court erred in holding that petitioner was negligent and that such negligence was the sole proximate cause of his injuries.*

Petitioner's negligence was for the jury. It is submitted that the verdict of the jury on this matter should be accepted as it should be accepted on the question of respondents' negligence. The majority hold that petitioner was negligent as matter of law because (1) he did not use his lantern or fusee to see what was before him, (2) he acted on the impression that the caboose had passed over the bridge, and (3) he alighted on the south side of the tracks instead of the north side.

The jury found that petitioner was contributorily negligent and therefore reduced his damages one-third. We believe that this matter was properly submitted to the jury and that the Utah Court was in error in holding that petitioner was negligent as matter of law.

The evidence established without contradiction that the acts of petitioner were in accordance with the practice of railroad workers. As to the ordinary way of dismounting from a train in the nighttime petitioner testified:

> "You look down as you step, you don't make any examination with your light, you have your light in your hand, you just step down, see that it is black and you walk along for firm footing, you don't take any time to examination." (R. 143).

And again:

> "I never made any examination with my lantern as to where I was stepping, but just like all railroad men when they are getting on and off of a car, they make a glance. It looked like it was black when I stepped, looked like I was still standing on the right of way." (R. 95, 96).

That he did not make a minute examination and feel his way along did not make him negligent as matter of law. He was acting in the usual and ordinary manner and as other railroad men usually acted. By reason of the darkness of the night and the black roadbed he mistakenly believed the caboose was over solid ground. No provisions were made by respondents to call his attention to the location of this bridge. He was intent upon the performance of his duties to expedite the movement of his train and did not make a thorough examination of the roadbed.

He dismounted in accordance with respondents' safety rules, on the side away from passing tracks, and the testimony was uncontradicted that this was the proper side from which to dismount, and in addition the difficulty to be located and remedied appeared to be on that side and he therefore "naturally" alighted from that side. (R. 90).

That he was under the impression that the caboose had passed the bridge and acted on that impression would not be negligence as matter of law. The majority even admits it was a "very human thing to do." (R. 183). Certainly respondents afforded no warning to dispel that impression. Therein were they negligent.

The Utah Court, not being content with the finding of the jury to the effect that petitioner was negligent, goes further and holds as a matter of law that his negligence was the sole proximate cause of his injury. This finding of negligence was employed to support the finding of absence of duty on the part of respondents and thus it became a complete defense to petitioner's action. The Federal Employers' Liability Act expressly eliminates contributory negligence as a defense (U. S. C. A., Title 45, Sec. 53). In the very face of this plainly worded statute the majority of the Utah Court held that the contributory negligence of the petitioner barred recovery. They reach this er-

roneous result by using the simple expedient of calling contributory negligence "sole proximate cause." This Court denounced that subterfuge in *Grand Trunk Western R. R. Co. vs. Lindsay,* 233 U. S. 42, 47, 34 S. Ct. 581, 58 L. Ed. 838, 842, in the following language:

> "* * * and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendants' negligence, the statute would be nullified by calling plantiff's act the proximate cause and then defeating him, when he could not be defeated by calling his act contributory negligence."

This doctrine was reaffirmed in *Tiller vs. Atlantic Coast Line R. Co.,* supra. The holding of the Utah Court on the question of proximate cause is likewise contrary to the decisions of this Court in: *Illinois C. R. Co. vs. Skaggs,* supra, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R. Co. vs. Hadley,* 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co. vs. Campbell,* 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683.

The Utah Court, after suggesting that petitioner was the only active participant in the final event, holds that the sole proximate cause of his injuries was his own neglect. This holding is used not only to support the finding that the place where petitioner was working when he was injured was not a place to work but also the companion finding that the respondents were not negligent in the construction, care and maintenance of the bridge. This argument is not only fallacious in principle, inasmuch as no significance is attributed to the condition of the bridge and its location, but is contrary to the holdings in the controlling decisions of this Court. From the decision in Illinois C. R. Co. v. Skaggs, supra, at page 250 of 36 S. Ct., we quote:

"It is contended that the State Court erred in permitting a recovery under the Federal Statute for the reason that the injury resulted from Skagg's own act, or from an act in which he participated. The company, it is said, 'cannot be negligent to an employee whose failure of duty and neglect produced the dangerous condition.' It may be taken for granted that the Statute does not contemplate a recovery by an employee for the consequences of action exclusively his own; that is, where his injury does not result in whole or in part from the negligence of any of the officers, agents, or employees of the employing carrier, *or by reason of any defect or insufficiency, due to its negligence, in its property or equipment.* 35 Stat. at L. 65, Chap. 149, Comp. Stat. 1913, Sec. 8657. But, on the other hand, it cannot be said that there can be no recovery simply because the injured employee participated in the act which caused the injury. The inquiry must be whether there is neglect on the part of the employing carrier, and, if the injury to one employee resulted 'in whole or in part' from the negligence of any of its other employees, it is liable under the express terms of the act."

The Utah Court in effect nullified the F. E. L. A. by refusing to give effect to the supportable finding that petitioner's injuries were caused in whole or in part by respondents' negligence. An enlightening discussion of this principle is found in the recent case of *Eglsaer v. Scandrett*, 151 Fed. (2d) 562 (7th C. C. A. 1945) commencing at page 565.

"'* * * it seems clear, in the light of the provisions above abstracted, that the liability statute definitely recognizes the complex causal basis of most injuries, and, in effect, states that if, among the several factors which have combined to produce an injury within the purview of the statute, there shall be found *any negligent act or omission on the part of the carrier to which*

> *such injury was in part due, then liability for such injury shall fall upon the carrier.'*

The Utah Court was evidently unmindful of its own declaration in an identical case: *Miller vs. Western Pac. R. Co.*, 1929, 73 Utah 442, 455, 274 P. 945, where a trainman in the nighttime stepped from a caboose while it was standing on a bridge.

> "The fact that plaintiff may not have exercised ordinary care before stepping from the caboose, as indicated by the evidence, goes only to the question of his contributory negligence, which is not material to the question presented here."

The injuries to petitioner resulted from the concurring negligence of respondents and his own conduct. Both were necessary to produce the end result. The negligence of respondents having contributed to the cause of the injury, the question of proximate cause was properly left to the jury and the majority of the Utah Court erred in substituting its judgment for that of the jury and in setting aside the verdict and dismissing the case. *Grand Trunk W. R. Co. vs. Lindsay*, supra; *Rocco vs. Lehigh Valley R. R. Co.*, 288 U. S. 275, 77 L. Ed. 743, 53 S. Ct. 343; *Miller vs. Central R. Co.*, 58 Fed. (2d) 635 (C. C. A. 3rd, 1932); *Gildner vs. Baltimore & O. R. Co.*, 90 F. (2d) 635 (C. C. A. 2nd, 1937); *Mumma vs. Reading Co.*, 146 F. (2d) 215 (C. C. A. 3rd, 1944); *Norfolk & W. Ry. Co. vs. Riggs*, 98 F. (2d) 612 (C. C. A. 6th, 1938); *Ballard v. Atchison T. & S. F. Ry. Co.*, 100 F. (2d) 162 (C. C. A. 5th, 1938); *Atchison T. & S. F. Ry. Co. v. Ballard*, 108 F. (2d) 768 (C. C. A. 5th, 1940); *McCarthy vs. Pennsylvania R. Co.*, 156 F. 2d 877 (7 C. C. A. 1946).

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah should be reversed as being in conflict with the express provisions of the Federal Employers' Liability Act and the controlling provisions of this Court construing that Act, and that the verdict of the jury and the judgment of the trial court should be reinstated.

Respectfully submitted

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APPENDIX

Sec. 51, Title 45 U. S. Code Annotated:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

Sec. 53, Title 45 U. S. Code Annotated:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negli-

gence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66."

Sec. 54, Title 45 U. S. Code Annotated:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

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SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY and HENRY SWAN, Trustees of The Denver and Rio Grande Western Railroad Company.

Respondents.

Petitioner's Reply Brief

Ellis v. Union Pacific Railroad Company Decided by the Supreme Court of the United States February 3, 1947, Not Yet Officially Reported

Petitioner respectfully submits that the decision of the Supreme Court of Utah in the case at bar is at variance and in conflict with the decision of this Court in the *Ellis* case supra and should be reversed. In reversing the judgment of the Supreme Court of Nebraska in the *Ellis* case

this Court considered the evidence to the effect that the place where Ellis was working when injured was deceptively dangerous because the overhang of the car on the curve and its tilt toward the building, resulting from a high outside rail, impaired and made insufficient clearance which was otherwise safe. In the case at bar the place where petitioner was working when injured was rendered deceptively dangerous by the darkness of the night, the black slag roadbed and the absence of foot walk, handrail, lights and markers. In the *Ellis* case the railroad company offered evidence which tended to prove that the clearance was impaired by the erection of a building over which it had no control; that neither the overhang of the car nor the pitch of the curve was unusual; that a sign was maintained near the building warning of impaired clearance and that petitioner could have performed his function equally well and in safety to himself on the opposite side of the engine. In the case at bar the railroad company contends that the judgment of the Utah Court should be affirmed on the strength of testimony to the effect that there was a platform between the tracks, that petitioner could have performed his function equally well and with safety to himself by dismounting on the north side of the train and that petioner did not look "*effectively*" before he stepped off the car. This Court in reversing the decision of the Nebraska Supreme Court in the *Ellis* case, made the following significant statement:

> "* * * it would not have been unreasonable for the triers of fact to have inferred that it was proper and usual procedure to work on the right side of the engine, that the hazard was not readily apparent and was almost in the nature of a trap, that while the sign was placed so as to be readily visible from a train, it was

> insufficient warning to a man on the ground and that consequently petitioner was not furnished a safe place to work."

And in a foot note:

> "The duty of the carrier to furnish a safe place to work 'is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.' *Bailey v. Central Vermont R. Co.*, supra, page 353." (319 U. S. 350)

Under the evidence in the case at bar it was not unreasonable for the jury to infer that it was proper and usual procedure for petitioner to alight from the train on the south side. The flying fire had been observed on that side, and passing tracks, where passing trains could be expected, were but a few feet to the north. The jury could well infer from the evidence that the hazard of the bridge was not readily discoverable and that the bridge was therefore deceptively dangerous. While in the *Ellis* case the railroad company had taken the precaution of posting a warning of impaired clearance, the railroad company in this case had taken no precaution whatsoever to warn employees of the existence and dangers of the bridge. The mere fact that Pauly may have failed to exercise the highest degree of care for his own safety is not fatal to his cause. This Court in the *Ellis* case spoke as follows on that subject:

> "Again, both parties might have been found negligent, in which event it would have been the duty of the jury, as the trial judge charged, to render a verdict based upon the damages caused by respondent's negligence diminished by the proportion of negligence attributable to petitioner. 45 U. S. C. Sec. 53."

In view of many of the statements made and attitude expressed by respondents in their brief, petitioner believes that he should make a reply, therefore, this brief.

All italics are added.

Herein Of Misconduct

On page 3 of respondents' brief is a statement of peculiar interest. It proceeds as follows: "The Supreme Court has shown a most tolerant and forbearing attitude toward petitioner in view of his flagrant misconduct in attempting to 'reconstruct' his evidence to his own advantage." Respondents have employed this argumentative charge throughout the whole course of this litigation. The evident purpose has been to create animosity against petitioner and his counsel. The matter of petitioner's alleged misconduct will be explored in the paragraphs to follow, but we pause to remark that his alleged "flagrant misconduct" in testifying responsive to "shockingly leading" and "suggestive" questions does not in any way prove that respondents furnished petitioner a safe place to work. The purpose of petitioner's action was to secure a determination, in proper judicial proceedings, of the question whether respondents failed in their duty to furnish petitioner a reasonably safe place to work, and if so, whether this failure contributed in whole or in part to the cause of his grievous and permanent injuries.

Respondents have pointed out certain conflicts between the testimony of petitioner as given in a deposition taken prior to trial and at the trial. It is true that in the deposition he testified that he checked the passing train from the rear, or east end, of the caboose, and at the trial testified that he checked the passing train from the front, or west

end, of the caboose. The impression is left that this testimony was given responsive to "shockingly leading questions." The following taken from petitioner's direct examination appears in the record commencing at page 89:

> Q. All right, go ahead.
>
> A. After I put on my hat and coat and grabbed up my lantern and yellow fusee, I stepped out of the west end door, and, as I did so, this, the engine on the passing track was just passing the west end of the caboose, and I checked the number on that engine, and immediately turned around to step down on the left, to go check that car.
>
> Q. Now, you saw this train pass you; and what train was it, by the way?
>
> A. No. 20.

In the course of the cross examination, which speaks for itself with reference to the fair, impartial and non-confusing attitude under which it was conducted, petitioner testified: (R. 106)

> Q. Then you have gone over this deposition recently, have you not, Mr. Pauly?
>
> A. Oh, yes.
>
> Q. When?
>
> A. Well, I went over it last night.
>
> Q. And in whose presence?
>
> A. No one's presence, my wife and I.
>
> Q. Have you gone over it, prior to last night, recently?
>
> A. Yes.
>
> Q. When?

A. I had the deposition in Grand Junction.

And at Record 115-116-117:

Q. Do you remember whether you went to the rear end of the caboose, after your caboose came to a stop?

A. No sir.

Q. You don't remember?

A. I didn't go to the rear end.

Q. You didn't go to the rear end?

A. No sir.

Q. Are you positive?

A. After my caboose was stopped?

Q. Yes.

A. No sir.

Q. Did you, just before your caboose was stopped?

A. I was on the rear end before my caboose was stopped, yes sir.

Q. And how long before your caboose was stopped were you on the rear end?

A. Coming over the east switch.

Q. Coming over the east switch?

A. That is correct, my hind brakeman and I were both on the rear platform coming over Chacra.

Q. How long did you stay?

A. Not very long.

* * * * * *

Q. You saw that headlight, then went in; is that the way you testify?

A. Yes sir.

Q. How far was the headlight away from you at the time you thus saw it?

A. Well, coming down the pass.

* * * * * * *

Q. Then how far back was it?

A. Thirty car-lengths away.

Q. Thirty car-lengths away?

A. Thirty, yes; you understand that isn't definite now.

Q. Now, I understand that, but that is your best judgment. Did you stay out on the back platform and check it as it went by?

A. No sir.

Q. That is one of your duties as trainman, isn't it, to check other trains that go by you, isn't it?

A. That's correct.

* * * * * * *

Q. Where did you fulfill your duty with respect to checking Train No. 20?

A. On the west platform.

Q. On the west platform; and not on the east platform?

A. That's correct.

Petitioner frankly admitted that in his deposition he testified that he checked the passing train while on the rear platform of the caboose.

On the basis of petitioner's affirmative answers to numerous "*Was* it true?" or "That *was* true, *wasn't* it" questions, respondents assert that the testimony given by petitioner at the trial was not only in conflict with that

given in the deposition, but with the direct examination as well. An examination of this cross examination, commencing at R. 117, will clearly reveal that petitioner was confused and that his confusion was taken advantage of by respondents' counsel. At R. 119 appears the following:

> Q. Do you remember testifying as follows:
>
> "Q. At that time you were on the head end of the caboose, were you?
>
> A. No.
>
> Q. At that time you were on the head end of the caboose, is that right?
>
> A. When I checked the train I was on the rear end."
>
> Q. Do you remember so testifying?
>
> A. Yes, sir.
>
> Q. Was it true?
>
> A. Yes. Also made—
>
> Q. Just answer the question, will you?
>
> A. It wasn't—
>
> Q. It wasn't true?
>
> A. That's correct.

Further revealing the attitude of petitioner is an answer made by him appearing at R. 122:

> "A. Well, I tell you they were true, I made a lot of statements, particularly to this accident at the time it happened, that wasn't on the mind, at the time the deposition was taken; that was the reason I went over with my wife last night, to get that in mind."

The Court recognized the confusion in which petitioner was placed by this strange and unusual cross examination

(R. 122). Nevertheless the examination continued (R. 123):

Q. Now, did you so testify at the time I took your deposition?

A. Did I testify to that?

Q. Yes; that I just read.

A. Yes.

Q. Was it true?

A. At that time, I have made a lot of the particulars, there is a lot of particulars I wanted to go over. I know I made a lot of statements in that deposition that are not true, as far as I can understand them to be, because the particulars of the case weren't in my mind.

Q. Didn't you think they were true at the time you gave your testimony?

A. At that particular time, yes.

It is apparent from the record, and was evidently apparent to respondents' counsel, that the witness was doing his very best to explain and justify the conflict, but nevertheless counsel persisted with his "*Was* it true" or "It *was* true, *wasn't* it" questions.

At Record 124 appears the following:

Q. Now did you so testify?

A. Yes, sir.

Q. Was it true?

A. There is a lot of particulars about it that come to my mind when I made that statement that are not true now.

Q. Something that was true then is not true now?

Q. Will you tell the jury something was true on August 1st, and it isn't true now?

A. No, sir; I mean—

Q. What do you mean?

A. I mean the particulars in my case weren't settled in my mind; I hadn't gone over anything at that time, at the time I came over for the deposition.

A. And last evening, when I took the deposition to study it over, there were a lot of particulars concerning my case that come back to my mind, a clearer view to some of the former statements I made might conflict with what I have said.

Counsel continued to badger this witness with "*Was* it *true*" questions.

The following is both typical and interesting (R. 125):

Q. You did so testify, didn't you?

A. Yes.

Q. Were they true, was that true that you testified to?

A. It was true except for—at that particular time that the deposition was taken, I thought they were true, yes.

And then follows:

Q. The question was whether you now thought that they were not true; your answers were not true?

A. No.

Q. You think they were not true?

A. They were not true now?

Q. Is that what you are saying?

A. No, I haven't said anything, I am trying to get clear in my mind what you mean and what I mean. I don't say that I lied, that isn't true what I said, no. No, what I want to do—

MR VAN COTT: I don't know whether the record is clear, your Honor. I can go back and read those two questions and answers, *but I think the witness is confused,* and I would rather do that than have any confusion.

We submit that in view of the cross examination respondents' counsel has exhibited considerable fortitude in charging petitioner "with flagrant misconduct." All of this cross examination occurred prior to petitioner's redirect examination, of which counsel so bitterly complains. See respondents' brief pages 3 and 4.

It will be remembered that both Ventura and petitioner testified that they were on the rear platform of the caboose at the time it crossed over the east switch at Chacra and that thereafter they entered the caboose for the purpose of making preparations to dismount. All the testimony is to the effect that petitioner was never on the rear platform at any time thereafter. Ventura's testimony supports the proposition that petitioner entered the caboose before passenger train No. 20 reached them. Commencing on page 39 of the record is the following testimony:

Q. Mr. Ventura, as this freight train was slowing down, as it pulled into Chacra, did you see Mr. Pauly in the caboose?

A. You mean in the caboose?

Q. Yes, as the train was slowing down before you dismounted?

A. Yes sir, Mr. Pauly put a new battery in his lantern, tried it out, and grabbed a fusee, a yellow fusee, I don't know whether ten minutes or five minutes—

Q. Where in the caboose was Mr. Pauly at that time?

A. He was at his desk, had his grip, and he got the battery out of his grip.

Q. Where was his grip, and where was he with respect to the east or west end of the caboose?

A. At the west end of the caboose, the desk is on the north side of the caboose.

Q. On the north side, to the west end?

A. To the west end.

It seems appropriate at this point in view of respondents' harsh attack upon petitioner, involving as it does his counsel, to make a statement which may or may not be of any interest to the Court. The author of this brief conducted the presentation of petitioner's testimony to the Court and jury. He was well aware of all of the statements made by petitioner in his deposition and naturally discussed the facts and circumstances surrounding the occurrence complained of with petitioner and his wife on several occasions prior to trial. The evening before petitioner was placed on the witness stand, he informed counsel that he had made a mistake in the testimony given in the deposition, that in the deposition he had stated that he checked passing train No. 20 from the rear end of the caboose when as matter of fact he checked it from the front end of the caboose. There never was any question in either the mind of petitioner or counsel as to what the testimony should be in view of this circumstance. For

petitioner to have repeated his former statement would have been nothing short of intentional falsehood. This is not the first instance where an honest man has made a statement which he thought at the time to be true and discovered later to be otherwise. Harry Pauly never intended to lie or to misstate the truth at any time in this case, and in the course of his deposition he stated what he then sincerely believed to be true. When he discovered and became convinced that several of the statements made in the deposition were not true, he confessed and admitted the conflict and attempted as best he could to explain why the misstatements had been made.

Counsel for respondents clutched this conflict to his bosom and though his great sense of justice was apparently outraged, he was wholly unable to transplant his fury into the minds of the jurors. They knew, as did the trial judge and all who participated in the trial, except counsel for respondents, that petitioner was honest, and that he did his best to state the truth even though he suffered embarrassment in so doing.

Petitioner's case was founded upon a charge that the bridge was within and a part of a work area and that as such it had not been constructed or maintained in a reasonably safe condition for its foreseeable use. Where or from what position Pauly checked the passing train could in nowise affect the condition of this bridge or its relationship to the work necessarily incident to the handling of respondents' trains in that locality. Petitioner, no doubt, would have stepped off the bridge where he did regardless of the point from which he checked the passing train. It is inconceivable that this fact contributed in any way to the culmination of events which led up to petitioner's

serious and permanent injuries. Counsel suggests that this so-called reconstruction of testimony was a deliberate attempt to fabricate and manufacture evidence, and suggests that "The Supreme Court of Utah might well have applied a much harsher expression than 'reconstruction' to this effort by Pauly (under questions from his counsel) to depart from the truth and change his evidence. That the Court did not take a more drastic view, with appropriate action, manifests a tolerance and forbearance to Pauly's case which entirely refute the vituperative remarks in Pauly's brief." (Resp. Br. 4). A threat of "harsh or drastic punishment," from whatever source it might have come would not have deterred petitioner from giving the exact testimony which he gave nor would such threat or possibility of harm or punishment have caused petitioner's counsel to advise a contrary course. If the jury had believed petitioner guilty of misrepresentation and of changing and manufacturing testimony to suit the needs of the occasion or that his counsel had advised it, the verdict would have been other than it was. We say to the Court, let the verdict determine what the trial court that heard the case and the jury which determined the issues of fact thought concerning petitioner's attitude, his appearance, his demeanor, his integrity, and his cause.

Statement Of The Case

Respondents state under the above heading at page 5 of their brief "Pauly had no work to do on or near the bridge itself." This argument is rather remarkable in view of the fact that it is admitted by all parties to this case that the first duty petitioner was required to perform at Chacra after the train stopped was to dismount from the

caboose. Certainly dismounting from a caboose is work. This is admitted by respondents on page 6, where they state: "It was Pauly's duty as soon as the train was stopped to dismount from the caboose and walk from 500 to 750 feet westerly to the car that was in trouble and eliminate the sticking brakes." The jury evidently believed that dismounting from the caboose was work and we believe that their findings on this point should be accepted.

HEREIN OF OMISSIONS AND MISSTATEMENTS

Respondents set forth twelve particular instances of alleged omissions and misstatements in petitioner's brief.

Petitioner will discuss these alleged omissions and misstatements under the numbers used by respondents in their brief (Pages 7 to 32):

(1) *Respondents' Brief*, p. 7.

Petitioner testified that he looked just before he stepped. On redirect examination, after the cross examination by the "Was it true?" method, petitioner testified (R. 142, 143):

> * * * went down the steps, glanced down. I did not make any examination with my light, glanced down; it looked black like it was the road bed, and then I just stepped right off.
>
> THE COURT: I would like to have one of you ask him when he says, 'I glanced down,' where does he mean?
>
> Q. Where did you mean when you said you glanced down?

A. Glanced down from my footing where I was stepping to, and it looked black.

THE COURT: Did you say 'for' my footing?

A. Yes, sir, where I was stepping off.

Q. It looked black to you at that time?

A. Absolutely right."

This was the last testimony given by petitioner on the subject.

The following is an example of what respondents claim is an admission of failure to look (R. 133, 134):

Q. Did you testify as follows:

A. No, it was all black to me as if I was on the main line is all on the side of the track.

Q. Did you so testify?

A. I so testified, but if it appeared all black to me as that statement says, I must have looked, didn't I?

Petitioner did not look with sufficient effectiveness to discover that the caboose was standing over the unguarded and unlighted bridge. He did look, however, and erroneously concluded that black slag roadbed was beneath him. His mistake is attributable to respondents failure to provide and install lights or markers or to equip the bridge with guardrail and platform.

Ventura's testimony is noteworthy:

Q. And before you stepped down from that caboose, you looked down, did you?

A. Yes, sir, for a second. (R. 52)

In alighting from cars railroad employees do not make a long and searching examination of the place upon which they are about to step (R. 95, 96, 143).

Ventura's "for a second" look led him to believe that black slag roadbed was below him. Petitioner's look led him to a similar conclusion. Ventura's conclusion was correct, petitioner's was not. Had petitioner's conclusion been correct he could have testified, as Ventura did, that he saw solid ground beneath him. Ventura's testimony that he saw the roadbed could only be based upon his own belief resulting from his "for a second" look and the fact that roadbed was actually beneath him when he stepped off.

Ventura, just as petitioner, did not see the bridge and did not know it was there (R. 54).

Under Alleged Misstatement (1) appears the following: "Petitioner's brief attempts throughout to give the impression that the petitioner looked *effectively* before dismounting from the caboose." Respondents evidently do not regard this statement as being a "misstatement." It is interesting to note that no citation from petitioner's brief is given in support of this charge. Petitioner has admitted from the outset that, unfortunately, he did not look *effectively* before he stepped down but that does not mean that he did not look at all. Petitioner testified time and time again that it looked all black to him as though he were stepping onto the shoulder. The record citations given by respondents do not support the contention that petitioner stepped down without looking at all. If the record is examined, it will be revealed that what petitioner said and what he testified to was that he looked down

and it looked all black to him and he just stepped off without making a careful examination. If the law were such as to require an injured employee seeking damages for injuries sustained by him as a result of falling into holes or depressions, or over ties, angle irons, rocks or clinkers, etc., when dismounting from engines or cars, to prove as a condition precedent to recovery that he looked "*effectively*" before he stepped off, then he could never recover. If he is required to look effectively he is required, at his peril, to discover the existence of the dangerous condition whatever it may be.

The opinion of this Court in *Brady v. Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232, does not support the proposition for which it is cited at page 8 of respondents' brief.

At page 8 of their brief respondents state:

> "The evidence relied on by plaintiff on page 6 is at best extraordinarily weak because it does not justify any inference of looking *effectively* or even attempting to look *effectively.*"

There is no requirement known to petitioner, as revealed by the authorities, that a trainman must look *effectively* before dismounting from equipment, or that in the event of his failure to do so he is completely barred from recovery for injuries sustained by reason of the condition of the roadbed upon which he alights. The word "effectively" is defined as follows: "With effect;" "powerfully;" "completely;" "thoroughly." It is submitted that if petitioner had looked effectively he would have discovered the existence of the abyss below him regard-

less of its concealment and regardless of respondents' failure to exercise reasonable care in its construction and maintenance. A judicial requirement of effective examination before dismounting would repeal those provisions of the Federal Employers' Liability Act which eliminate contributory negligence as a defense in actions of this nature. Counsel has evidently been unable to find any authority which supports this view and we know of none. Petitioner's care or lack of care in dismounting from the caboose has no relevance whatsoever on the questions, "Was the bridge within a work area?" and "Was the bridge constructed and maintained for its safe foreseeable use?"

(2) *Respondents' Brief*, p. 11

Here again the use of the descriptive word *effectively* is misleading. There is nothing in the record which would preclude a finding that the darkness of the night, the darkness of the abyss and the black slag roadbed were deceptive to petitioner and could reasonably have led him into the false belief that the caboose was over the roadbed and not over the bridge. Respondents by their failure to furnish a platform, guardrail, lights or markers were responsible for the danger created by these deceptive circumstances.

Evidence that the caboose in the reflection of burning fusees and with lights inside was observable to people on the creekbed is not helpful nor is evidence regarding the distance at which a light could be seen. "How far that little candle throws his beam, etc."

(3) *Respondents' Brief,* p. 13

The testimony is clear that petitioner did not know the caboose was standing over the bridge. He looked and mistook the blackness of space for the black roadbed. To say that he knew the caboose was over the bridge when he stepped off into space is an accusation that petitioner attempted suicide. The evidence will not support this charge.

Respondents' statement that petitioner was familiar with the existence of the bridge and its condition harks back to the doctrine of assumption of risk, which would be a defense in this case if it had not been eliminated as such by congressional enactment.

(4) *Respondents' Brief,* p. 14

Petitioner has never denied the existence of the platform between the two tracks but has at all times contended that this was not a discharge of respondents' duty. See petitioner's brief pages 35-36-37-38. If the territory between the tracks was a place to work, then the whole of the bridge was a work place. Respondents could reasonably anticipate that trainmen would likely alight from the south side of trains standing on the main line track. By company rule trainmen were cautioned not to alight on the side adjacent to passing tracks, and in addition alighting on the south side is the natural thing to do when the evidence of sticking brakes (flying fire) is discovered and observed on that side of trains moving toward Chacra in the night time.

Respondents' contention concerning the platform between the rails is set at rest by the decision of this Court

in the case of *Ellis v. Union Pacific R. R. Co.*, supra. There the railroad contended that the employee "could equally well have performed his functions on the left, or safe, side of the engine." Plaintiff's evidence there indicated that persons performing the duties plaintiff was performing when injured frequently did so from the opposite, or right, side. The Court held that the jury might have concluded that the employee had a safe place to work but elected to choose a dangerous one and that any duty of warning was fully discharged by the presence of the sign calling attention to "impaired clearance," but on the other hand it could not be regarded as unreasonable for the triers of fact to infer that it was proper and usual procedure to work on the right side of the engine, "that the hazard was not readily apparent and was almost in the nature of a trap."

Another bit of evidence of importance in showing that the south side of the train was the proper or usual side from which to alight is the testimony of Ventura that when he looked for petitioner he looked along the south side of the train and not the north side (R. 53).

(5) *Respondents' Brief*, p. 14

Respondents state that it is not true that petitioner alighted from the south side for the reason that he had seen the fire on that side and dismounted there to fulfill his duty of inspecting and repairing the brake (R. 149). Respondents' statement is contrary to the record because that is just exactly what petitioner testified to (R. 91, 93).

When asked which was the proper side upon which to alight, he answered:

A. Well, naturally on the—naturally on the side where he had noticed the trouble.

Q. And why is that?

A. Well, you would assume that you would locate the trouble on that side, that would be greater. (R. 91)

According to all of the evidence and common sense as well he would more readily be able to locate the trouble on the side where he saw it. As he stated (R. 93):

> "My trouble was—naturally my trouble was on the left hand side. My mind was to get down on the left hand side to ascertain what that trouble was, as fast as I could, and in order to expedite the movement of my train, without further delay, and, naturally, my movement would be to turn to the left, and go down along that side of the train."

Petitioner has never contended that it was absolutely necessary for him to alight from the south side. He has claimed that under the circumstances he acted reasonably in so doing. He was deceived by the blackness of night and through respondents' negligence caused to mistake the blackness of space for the blackness of the slag roadbed (R. 53).

(6) *Respondents' Brief*, p. 15

Respondents persist in quoting from the deposition of Pauly and representing it to be testimony given at the trial. The error in this respect was called to their attention in petitioner's briefs supporting his Petition for Writ of Certiorari. Petitioner definitely testified on the trial of this case that at the time Train No. 20 passed he was on the west end of the caboose (R. 117), and that conflicting testimony given in his deposition was erroneous.

Q. Which part of that answer do you now say was untrue?

A. Oh, I stepped to the rear platform to check the train.

Q. You say that wasn't true.

A. That is right. (R. 126)

The Utah Supreme Court ended its discussion of this passing train incident as follows (R. 184):

"At least he could have waited a moment until it passed."

Petitioner testified on direct examination that he checked the passing train when he was on the west platform of the caboose (R. 89):

"A. After I put on my hat and coat and grabbed up my lantern and yellow fusee, I stepped out of the west end door, and, as I did so, this, the engine on the passing track was just passing the west end of the caboose, and I checked the number on that engine, and immediately turned around to step down on the left, to go check that car."

(7) *Respondents' Brief*, p. 18

Under the Safety Rule the safe course is the proper course to pursue and petitioner very definitely stated that under this rule the left, or south, side was the safe side to alight from (R. 90). If respondents did not agree with this testimony they should have introduced evidence to rebut it. Their failure to do so affords strong support for petitioner's contention that the left side of the train was the safe side from which to alight. A proposition supported by uncontradicted testimony cannot be overthrown by mere statements of counsel.

(8) *Respondents' Brief*, p. 20

The testimony clearly shows that the passing tracks at Chacra were commonly used as a place to stop trains and permit other trains to pass, it likewise demonstrates that it was common practice to use said tracks as a place where trains could be stopped when in need of inspection and repair (R. 43-44). We are at a loss to understand how a common practice could be more clearly proven than it was here by the testimony of the witness Ventura. He testified that during all of the time he had been employed by respondents it had been common practice to stop trains there for the purposes above enumerated. That the stopping of trains at Chacra for the purpose of inspection and repair was usual and customary, is indicated by the fact that all members of the train crew knew exactly what their duties required of them when the train was brought to a stop there. As soon as the train was stopped each train crew member undertook the immediate performance of his duties incident to the work of train inspection, protection, and repair, and in so doing subjected the territory between switches there to usage as a work place. Ventura alighted from the caboose on the south side and proceeded back to flag; Arvis, the head brakeman, alighted from the engine and proceeded toward the rear. Petitioner was engaged in dismounting from the train preparatory to proceeding to the point of difficulty when injured.

Linkins testified that when trouble developed in a train "it is customary to try to stop between the switches" (R. 68).

(9) *Respondents' Brief*, p. 25

The attempt of respondents' counsel to mislead the Court by misstating the evidence here reaches its height. Respondents' state that it is "gross exaggeration" to state that the crippled train was moved four or five or several miles and that petitioner decided that the train should proceed to Chacra. Counsel would convey the impression that the engineer knew nothing of the trouble or of the contemplated stop at Chacra until the train arrived at the east switch and that he then took it upon himself to stop the train and that petitioner had nothing to do with the making of the decision to stop the train at that point.

Funston is six miles east of Chacra (R. 142). Just as the train was leaving the west switch at Funston, the head brakeman informed the engineer that fire was flying from the south side of the train toward the rear. The engineer decided to try to kick the brake off by a good application and, if that failed, to "go over to Chacra between switches and stop" (R. 69,70). The engineer testified that this was customary procedure. (R. 68)

As the train was leaving Funston petitioner's attention was called to the flying fire, indicating a sticking brake (R. 86). Petitioner determined to put out the red fusee so that the train would be stopped at Chacra. He knew that the signal could not be seen before the train came around the curve into Chacra (R. 87-88). It is thus clear that petitioner determined, when the flying fire was first observed as the train was leaving Funston, to stop the train at Chacra for inspection and repair.

(10) *Respondents' Brief*, p. 26

Petitioner and other members of the train crew were required to dismount from the train before proceeding to the place where the repair work was to be done, and in doing this it was reasonable for petitioner to alight from the south side of the train. We are not concerned here with a situation where a trainman was required to dismount from a caboose at a time when it was east of the bridge and to then proceed westerly toward a point of difficulty. Hence this alleged misstatement or omission as applied to the facts in the case at bar has no relevance or significance whatsoever.

(11) *Respondents' Brief*, p. 26

A careful reading of petitioner's testimony commencing at R. 140, will demonstrate that he was asked whether he was familiar with the bridges over creeks, gullies or canyons within the various yards and between switch points at sidings and passing tracks in the division embracing Chacra, and that he answered affirmatively, that he was then asked if the bridges over such creeks and gullies at these places were equipped with footwalks and handrails and he stated that they were (R. 141). He then produced a list of bridges over creeks and gullies, etc., between switch points at stations, switch tracks, sidings and passing tracks within said division and proceeded to describe each of such bridges and stated that all of them except one were equipped with footwalks and guardrails on each side. The one exception, the bridge at Rifle, had a handrail and footwalk on the left side only.

Respondents state, on page 27 of their brief, that petitioner admitted that he had only counted the bridges that were equipped with footwalks and handrails, thereby seeking to create the impression that there were other bridges over gullies or creeks between switches which were not equipped with guardrails and footwalks. This is misleading. Petitioner definitely testified that he was describing all of the bridges between switch points within the division. It may be that other bridges between stations in this territory are not equipped with guardrails and footwalks, but from the evidence it is clear that all bridges between switches except at Chacra and Rifle were equipped with guardrails and footwalks on both sides. This conclusively appears from the following question which was addressed to Linkins and the responsive remark of respondents' counsel (R. 151):

> "Q. • • • • What have you noticed with reference to the condition of these bridges between switch points: that is, with respect to foot walks and guard rails?
>
> MR. VAN COTT: If the Court please, this is purely cumulative. I have no intention of producing any evidence to the contrary of what he testified."

Respondents also state that all of the bridges mentioned by petitioner were within three or four hundred feet of switch points. The record does not support this statement. The record shows that petitioner admitted that several of these bridges were within that distance of switch points. He did not testify or convey the impression that all of the bridges so mentioned were within that distance of switches (R. 145).

(12) *Respondents' Brief*, p. 32

Petitioner has never contended that there was anything but a general verdict returned in this case. While there were no special findings, reference should be made to Instruction No. 9 (R. 14):

> "• • • • that if you shall find from a preponderance of the evidence each of the following: (1) that the defendants could and should reasonably have anticipated that plaintiff or other members of its train crews in the performance of their duties would in the nighttime alight from one of their trains on the south side thereof while said train was upon the bridge at Chacra; and (2) that defendants failed to and did not keep and maintain the south side of said bridge in a reasonably safe condition in that said defendants did not keep and maintain on the south side of said bridge a foot walk, guard rail or light; and (3) that by reason of the failure of defendants to keep and maintain on the south side of said bridge a foot walk, guard rail or light, the defendants did not use reasonable care in providing its employees a safe place to work, then and in such an event, you may find that defendants were negligent, and if you shall find and believe from a preponderance of the evidence that defendants were thus negligent by their failure to keep the south side of said bridge in a reasonably safe condition for the use of their employees, as hereinabove set forth, and that such negligence proximately caused, in whole or in part, the injuries suffered by plaintiff then you should find for the plaintiff. • • • •"

It is submitted that the verdict based as it was on Instruction No. 9, demonstrates that the jury found according to petitioner's contentions.

Respondents' statement, on page 32 of their brief, that the general verdict indicates only that there was a

finding of some negligence is ridiculous. The plaintiff was required to particularize in his complaint the act of negligence relied upon by him and the jury was specifically told by the foregoing instruction the particulars of the act of negligence which it was required to find before it would be permitted to award damages to plaintiff. The jury was not permitted to base a verdict on any act of negligence it might imagine existed, it was limited, of necessity, by the instructions.

Inconsistencies And Conflicts In The Testimony Are Properly Matters For The Jury

Because of the conflict in petitioner's testimony at the trial and in his deposition, respondents now argue that the only testimony given by him on matters wherein there was a conflict which the Court may consider is that which most strongly weighs against him. In support of this argument they cite *Fowler v. Pleasant Valley Coal Co.*, 16 Utah 348, 52 P. 594. In that case the plaintiff repeatedly and definitely testified that he knew of the dangerous condition of the walls of the mine, he also testified that he relied solely upon the statement of the foreman that no dangerous condition existed. This testimony was all given at the trial.

A later case from the Utah Supreme Court reaches a somewhat contrary result and is in accord with petitioner's contention here.

In *Sullivan v. Beneficial Life Insurance Co.*, 91 Utah 405, 64 P. (2d) 351 (1937), plaintiff commenced on action to recover on an insurance policy. Defendant pleaded that the policy had lapsed for non-payment of premiums. Plaintiff contended that the defendant had by its conduct

waived the strict performance of the policy provision relating to premium payments. On cross examination plaintiff testified to certain facts which supported defendant's contention, but on redirect and recross examination she gave testimony in conflict with her testimony on cross examination and which furnished substantial support for her theory of waiver. The trial court granted defendant's motion for a directed verdict and upon appeal respondent made the same contention as do respondents here, but the Court after reviewing numerous authorities, held with plaintiff and reversed the judgment. Among other things, the Court stated:

> "But we are unable to accept that view. The Court is not justified in determining whether a directed verdict should be granted to determine the weight of plaintiff's evidence found in cross examination or elsewhere."

The Court reviewed the opinion in the *Fowler* case and held that it did not support the contention made by respondent, and stated:

> "It is clearly a case where the ruling of the Court is based on definite and repeated testimony of the plaintiff that he had full knowledge of all the dangers and thereby makes the statement that he relied upon the statement of the foreman wholly improbable and entirely unworthy of belief."

Quoting from Corpus Juris, the Court stated:

> "To determine whether the evidence makes an issue of fact, the whole of the evidence and not merely certain selected parts thereof is to be considered."

In speaking of the evidence upon which the contention was based, the Court stated:

> "An examination of the evidence under cross-examination upon which respondents rely for destroying the evidence given on direct examination is not of the character found in the Fowler case. It cannot be said that there are such positive and clear-cut contradictory statements in the cross-examination as to make the evidence given in the examination in chief wholly incredible. Under such conditions, the rule announced by Justice Straup in the Putnam case that all the evidence be considered, and portions thereof may not be selected or omitted for the purpose of basing a judgment. Such consideration can be given only by the trier of fact."

Respondents seek to apply to this case the rule announced in *Smith v. Boston Elevated Ry. Co.*, 184 Fed. 387 and *Davis v. Woolworth Co.*, 60 Fed. (2d) 344. Those cases involved a change of theory between the first trial and the second trial. In those cases there had been a reversal of judgments obtained in the first trials.

The strict rule announced in the cited cases does not apply where the former testimony is given on deposition prior to trial. *Miller v. Schimming*, 129 Cal. App. 171, 18 Pac. (2d) 357; *Smarda v. Fruit Growers' Supply Co.*, 1 Cal. App. (2d) 265, 36 Pac. (2d) 701; *Goodman v. Meyers*, 50 Cal. App. (2d) 356, 122 Pac. (2d) 929.

Concerning a situation where prior inconsistent statements were proved, it was stated in *Matthews v. Atchison, T. & S. F. Ry. Co.*, 54 Cal. App. (2d) 549, 129 Pac. (2d) 435, 440:

"This situation, no doubt, has led defendant to make here an insistent argument against the credibility of plaintiff's testimony in this and other respects; an argument which might properly have been, and no doubt was, addressed to the jury, but which cannot prevail on appeal. There is nothing impossible or even inherently improbable about plaintiff's testimony. Everything to which he testified could have happened without doing violence to any of the laws of nature or any invariable pattern of human behavior. He was contradicted by other witnesses in the vital parts of his testimony; but whether he or the others should be believed was a question for the jury, upon which we are bound by their decision. 'A conflict between the testimony of a witness and statements previously made by him presents a question to the jury or trier of facts, and it is not the province of the appellate tribunal, under ordinary circumstances, to interfere therewith.'"

It was stated in *Henwood v. Chaney,* 156 Fed. (2d) 392, (Certiorari denied) 67 S. Ct. 113, as follows:

"The appellant in its brief presents argument relating to inconsistencies in the testimony of plaintiff's witnesses and to weight of evidence and credibility of witnesses. But the jury has passed on these questions and we are bound by its decision. *Tennant, Adm'x. v. Peoria & Pekin Union R. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520."

In Miller v. Schimming, supra, p. 359, the Court stated: "From the above recital, it is apparent that not only was plaintiff's testimony during the trial contradicted by his previous testimony given during the taking of his deposition, but also that his testimony on direct examination as to the location of his truck when he looked both to the east and west, and more particularly the distance to the west within which his vision was unobstructed, was contradicted by his later testimony on cross-examination. Nevertheless,

we are not prepared to say that his testimony, although clearly contradictory in the respects mentioned and conflicting in other respects, is entirely discredited and unworthy of consideration. It is not conclusive of this appeal that the record indicates that plaintiff's testimony during the trial was, in many respects, conflicting, and that it was contradicted by his testimony given on another occasion. The question of the credibility of witnesses is one that is to be determined solely by the triers of fact. *Farmer's Bank of Camarillo v. Goodrich* 90 Cal. App. 717, 266 P. 550 • • • •."

In *Smarda v. Fruit Growers' Supply Co.*, supra, the Court stated:

"Prior to the trial, the deposition of Andrew Smarda was taken, which differed in several material respects from the testimony given by him at the trial. The conclusions reached by us in our former opinion were based in a large measure upon the testimony given in the deposition, but we have come to the conclusion that testimony given upon the trial of the case is controlling on appeal and any discrepancy was for the jury to pass upon and for them to say where the truth lay."

There is no ironclad rule that a party may not change testimony once given where he honestly believes that his former testimony was untrue, such a rule would oftentimes bring the sanction of law to the aid of falsehood. This is recognized by decided cases.

In *Steele v. Kansas City So. Ry. Co.*, 265 Mo. 97, 175 S. W. 177, the Court stated:

"When a party litigant takes the stand as a witness for himself he ought to be permitted, and he is per-

> mitted, to protect himself from the human frailties of forgetfulness and mistake precisely as is any other witness. He ought not to be, and he is not, bound down by any cast-iron rule that he is forever concluded by any the least lapse of memory or oversight or mistake which may lead him by inadvertence to a misstatement of fact, which may as a matter of law destroy his case utterly. He may correct his errors and mistakes and lapses of memory and leave the jury, on the whole case, to pass upon his credibility."

In *Harlow v. Laclair,* 82 N. H. 506, 136 Atl. 128, the Court stated:

> "In other words, the law recognizes the fact that parties, as well as other witnesses, may honestly mistake the truth, and requires juries to find the facts by weighing all the testimony, whatever may be its source."

The Court also stated:

> "If a party's testimony consists only of a narrative of events in which he participated or which he observed, there is an obvious possibility that he may be mistaken like any other witness."

Any conflicts between the testimony of petitioner at the trial and in his deposition could involve at most a question of credibility for the jury. This Honorable Court has very definitely stated that weight of evidence and credibility of witnesses are questions exclusively for the jury. *Tennant v. Peoria & P. U. Ry. Co.,* 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

Authorities Relied On By Respondents Do Not Involve The Legal Aspects Of "Safe Place To Work" and Are Not Applicable Here

Respondents contend that *Baltimore & Ohio R. Co. v. Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510 is controlling here and state on page 52 of their brief that petitioner seems to concede the applicability of the *Sudduth, Hathcock, Marinko* and *Shirer* cases by making no effort to distinguish them.

Respondents contend that the negligence relied upon by plaintiff in the *Berry* case and upon which the case was submitted to the jury was the unsafe condition of the trestle. Surely respondents cannot be sincere in this contention. It is clear from reading the opinions of the Supreme Court of Missouri and the United States Supreme Court that plaintiff did not rely upon the failure of defendant to furnish decedent a safe place to work. He relied upon the negligence of the engineer in stopping the train when the caboose was on the trestle and the negligence of the conductor in directing or permitting deceased to alight from the caboose while it was so situated. It is to be noted that in the *Berry* case the train was not stopped between the switches of the passing track but was stopped on the main line to permit the lining of the switch so it could enter the passing track.

Petitioner here in "full bodied terms" relies upon a failure of material, the failure to furnish a reasonably safe place to work and not upon the negligence of any fellow employee. The distinction between the *Berry* case and the case at bar is demonstrated in *Cawman v. Pennsylvania-Reading Seashore Lines*, 110 F. 2d 832 (3 C.C.A. 1940, certiorari denied 311 U. S. 666, 85 L. Ed. 427, 61 S. Ct.

24). Because of this distinction the Utah Supreme Court refused to base its opinion upon the *Berry* case (R. 179). In the opinion in the case of *Kenney v. Boston & Maine R.*, 92 N. H. 495, 33 A. 2d. 577, the *Berry* case is cited but only in connection with the Court's consideration of the alleged negligence of fellow employees.

The *Berry* case is not cited, discussed, mentioned or relied upon in connection with the Court's discussion of the alleged failure to furnish a safe place to work.

The *Kenney* case, supra, is clearly distinguishable from the case at bar. No one could explain why the train was stopped over the bridge, there was apparently no reason for the stop and the business at hand did not require it. Neither could anyone assign any reason for the deceased alighting from the car. In the case at bar the stop was necessary in order to repair the brake and it was necessary for petitioner to dismount in order to make the necessary repairs. As a matter of fact the *Kenney* case supports the position of petitioner here. The court there declared that if the railroad could reasonably anticipate that an employee in the course of his duties would have occasion to alight from the train when it was upon the bridge, then the railroad would be required to keep the bridge in a reasonably safe condition.

In *Yazoo & M. V. R. Co. v. Sudduth*, 171 Miss. 619, 157 So. 527 (1934), relied upon by respondents, the court did not consider the failure of defendant to furnish a safe place to work for the very good reason that plaintiff placed no reliance on such failure. The Court stated:

> "The ground of recovery relied on by appellee is this: That when the engineer received the rear sig-

nal, he should have assumed that Sudduth might not know that the engine was on the bridge, and, therefore, it was his duty to instruct him not to get off on the right-hand side where there was no walkway but on the left-hand side where there was one. Did the failure of the engineer so to do, under the surrounding facts and circumstances as stated, constitute negligence—or rather, did it make an issue of negligence for the jury?"

The Court answered this in the negative and based its decision on the *Berry* case.

In *Missouri Pac. R. Co. v. Hathcock,* 200 Ark. 294, 139 S. W. 2d. 35, plaintiff's contention was quoted from his brief as follows:

> "The one allegation of negligence relied upon is that the conductor, Guy Maris, when the train stopped at Newport, sent appellee back down the track to flag any train that might approach, and carelessly and negligently failed to warn him of the presence and the condition of a trestle over which he would be compelled to pass in performing his duty and the danger incident to such passage."

The Court then stated:

> "Counsel have correctly stated that liability of the railroad company is predicated upon the act of the conductor in sending appellee down the track without warning him 'of the presence and the condition of a trestle over which he would be compelled to pass'."

In *Marinko v. Chicago, M. St. P. & P. Ry. Co.,* 63 S. D. 256, 257 N. W. 639, it could not be determined with clarity whether plaintiff contended that he was a passenger or an employee at the time he was injured. In any event the case is distinguishable from the case at bar on the grounds

(1) there was no evidence that employees had ever used the bridge or the territory adjacent thereto as a work place, (2) it was not shown that the bridge was a place where it could be anticipated that any work would be done and (3) the plaintiff did not alight in the performance of any duty relating to his employment. Plaintiff was a bridge carpenter and was being transported to a place where a bridge was to be repaired. The train stalled on an ascending grade and it was decided to move the train to the next station in two sections. The section on which plaintiff was riding was the second. It was left standing on the track while the other section was being moved. The car in which plaintiff was riding was on a bridge. He alighted for the purpose of answering a call of nature and was injured.

In *Davis v. Shirer,* 288 F. 293, the stopping of the train upon which deceased was working was required by an engine going dead in a preceding train. Defendant's rule required the flagman to dismount from trains stopped at unusual places and go back with danger signals three quarters of a mile to warn approaching trains. The deceased was the flagman charged with this duty but he went back only 400 feet where he placed torpedoes on the track. He then started back towards his train which was then moving slowly. At the time he attempted to board his train it was on a trestle. There was an unusual jerk and he was thereby caused to lose his hold and fall to the creek below, where he was drowned. Plaintiff relied on the unusual jerk and the unsafe condition of the trestle as negligence. There was no evidence that trains had ever stopped on this trestle or that it could be reasonably anticipated that a train would stop there. The Court laid great stress upon the fact that the deceased should have been

elsewhere and was not in the performance of his duties but was acting in direct violation of the rule of the company at the time he was fatally injured.

In the case at bar petitioner was engaged in the performance of his duties when injured and there was substantial evidence that trains customarily stopped at Chacra for the purpose of passing, inspection and repair.

There was a strong dissenting opinion in the *Davis* case written by Circuit Judge Waddill. The dissent approaches the solution of the problems presented in this type of case in a manner similar to that found in the more recent cases from the United States Supreme Court. The *Davis* case was decided in 1923.

It is respectfully submitted that none of the foregoing authorities aid or support respondents' contention here.

Lights And Markers

Respondents assert at page 54 of their brief that the record is void of evidence that the absence of lights or markers on the bridge constituted negligence. They argue that the absence of lights or markers can not be regarded as negligence because neither respondents nor other railroads use lights or markers on such bridges. The fallacy of this argument is pointed out by Mr. Justice Holmes in *Texas & P. R. Co. v. Behymer,* 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905:

> "What is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."

This Court stated in *Northern Pacific R. Co. v. Mares,* 123 U. S. 710, 8 S. Ct. 321, 31 L. Ed. 296:

> "• • • • ordinary care • • • • is not merely such care as other railroad companies exercise under like circumstances, for other railroad companies may be careless."

In *Bly v. Southern Ry. Co.*, 183 Va. 162, 31 S. E. (2d) 564, testimony was introduced that there was no custom or usage among railroad companies to place walkways or lights on bridges.

Following the foregoing United States Supreme Court decisions the Court held that this was not conclusive evidence of the exercise of due care, that the standard should be imposed by law and not usage or custom. See to the same effect *Bimberg v. Northern Pac. Ry. Co.*, 217 Minn. 187, 14 N. W. (2d) 410 (certiorari denied 323 U. S. 752, 89 L. Ed. 602, 65 S. Ct. 87).

Lights and markers would, no doubt, have called petitioner's attention to the presence of the bridge and the existing danger. This, at least, would have been a step in the direction of safety. Respondents contend that petitioner places no stress upon the lack of lights or markers. The failure to make the bridge safe and/or give warning of its presence is part and parcel of petitioner's charge as shown by the allegations in the complaint.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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No. 443

HARRY O. PAULY,

Petitioner,

vs.

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Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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In the ordinary case a complete answer to a petition such as this would be the oft applied policy of the Court against according an additional hearing merely on the tendencies of the evidence where no important question of law is involved.

Attention to this policy was called by Mr. Justice Roberts, Chief Justice Stone and Mr. Justice Frankfurter concurring, in his dissent in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1080, 63 S. Ct. 1062. On page 1066 he said.

> "And so the policy of the court has been to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of the law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed. The instant case plainly belongs in the class last mentioned. All members of the Supreme Court of Vermont agreed upon the controlling legal rule. They sharply and almost evenly divided on the question whether the plaintiff's evidence brought her case within that rule. What they decided, and what we decide, can add nothing to the body of jurisprudence."

That is precisely the situation in the case at bar. There is no difference between the Supreme Court of the United States and the Supreme Court of Utah or between the majority and minority of the Utah Court as to the controlling legal principles in the case at bar. If this Court grants certiorari to review this case nothing will be added to the body of jurisprudence respecting Federal Employers' Liability Act cases. There will only be an examination and decision by a third court as to the evidence and its tendencies.

The Supreme Court of Utah has manifested a sincere, conscientious and intelligent disposition to apply the Federal Employers' Liability Act strictly in accordance with the applicable decisions of the Supreme Court of the United States.

Petitioner makes the wholly unwarranted charge that the Supreme Court of Utah, follows a policy "of frustrating the operation of a Federal statute and ignoring and refusing to follow the decisions of the United States Supreme Court—." See p. 5. The actions of counsel for the petitioner belie this charge, else why do they select Utah as the forum in which they institute F. E. L. A cases arising in States other than Utah in favor of citizens of States other than Utah?

See:

Ehalt v. *McCarthy*, 104 Utah 110, 138 P. (2d) 639. Ehalt was a resident of Denver and was injured while working in Denver.

Bruner v. *McCarthy*, 105 Utah 399, 142 P. (2d) 649. Bruner was a resident of Grand Junction, Colorado, and was injured while working in Colorado.

Allison v. *McCarthy*, 106 Utah 278, 147 P. (2d) 870. Allison was a resident of Colorado and was injured while working near the Royal Gorge in Colorado.

Pauly v. *McCarthy*, 166 P. (2d) 501 (not yet reported in Utah Reports). Pauly was a resident of Grand Junction, Colorado, and was injured while on duty near Glenwood Springs, Colorado.

The foregoing are only a few of the many cases that counsel for this Petitioner have filed and are filing in the Utah courts under the Federal Employers' Liability Act against the various railroads, involving accidents to residents of foreign States, occurring in foreign States.

It is submitted that a reading of the four cases above cited will demonstrate a disposition on the part of the Supreme Court of Utah conscientiously to apply the Federal Employers' Liability Act according to the applicable decisions of the United States Supreme Court, having full regard to the broadening of the Act which has followed the decisions commencing with *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444.

On page 24 petitioner contends that the Supreme Court of Utah is "not in accord with the holding of this Court in the *Tiller* case—" in regard to assumption of risk. It is submitted that the Utah court in the *Pauly* case manifested complete sympathy with the decision in the *Tiller* case regarding assumption of risk and that its decision is in no way based upon assumption of risk. The court referred to assumption of risk as "a cruel doctrine" and stated that it was fortunate that it had been "forever abolished in the railroad industry." (R. 185.)

Statement of The Case

Respondents are constrained to make a statement of the case and to point out the omissions and misstatements in petitioner's brief because Petitioner misstates and omits important evidence and facts.

Pauly, an experienced railroad conductor, was injured when he backed off and dropped from a standing caboose (R. 92) in the night time without looking for safe footing (R. 133-135), in violation of Safety Rule No. 3 of the Company reading:

> "Before getting on or off equipment, employees must look out for safe footing—." (R. 7, 130, admitted in evidence R. 131.)

Pauly knew this rule and knew it was necessary to look for safe footing before stepping down. (R. 132.) There was no footing whatever because the south step of the caboose was almost flush with the south ends of the ties of the bridge. (R. 30.) He dropped off into space and fell 17 feet to the bottom of the creek. (R. 92.)

Pauly, if he had looked, could have seen that there was no footing and that he would drop into the creek bed. (R. 52, 53, 55, 74, 76, 88, 101, 102, 114.) He had in his hands when he dropped a lighted electric hand lantern (R. 91) and a lighted yellow fusee (R. 91), either of which, if he had looked, would have disclosed the situation and danger. (R. 52, 62, 157.)

Pauly thought about the danger of the bridge only a few seconds before he dropped (R. 108) and realized he was near it, but guessed that he was past the bridge by three or four car lengths, (R. 109) (150 to 200 feet) (R. 38), and acting upon that guess dropped off backwards without looking.

Pauly had no work to do on the bridge itself. (R. 88.) The train had been brought to a stop at Chacra because shortly before reaching there Pauly, his rear flagman Ventura, the Engineer Linkins and the head brakeman all knew that brakes were sticking, causing fire, on a truck of a car in the train. (R. 36, 69, 86.) Pauly thought that the car in question

was ten to fifteen car lengths (500-750 feet) ahead of the caboose. (R. 88.) It was Pauly's duty as soon as the train was stopped to dismount from the caboose and walk from 500 to 750 feet westerly to the car that was in trouble and eliminate the sticking brakes. (R. 88.) Pauly had no work to do at the bridge. On the contrary it was his duty, as he himself testified, to proceed forthwith to the car that was in trouble to fix it. (R. 88.)

The train had stopped on the main line which was the southerly of the two tracks. North of it was the passing track. The space between the two tracks was completely covered by a plank footwalk, 12 feet wide with 7 to 8 feet clearance when trains occupied both tracks. (R. 50.) Pauly could have dismounted on it and crossed over the bridge on it on his way to the car with the sticking brakes. Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217, admitted in evidence R. 29), Exhibit I (R. 223, admitted in evidence R. 28). Pauly stepped off on the other side, the south side where there was no footwalk. (R. 92.)

There was no train on the passing track when Pauly stepped down. Nor was there any train on the passing track while Ventura, after the accident, walked forward twenty to twenty-five carlengths, 1000 to 1250 feet, and then returned to the caboose. (R. 41, 46.)

Pauly could have proceeded safely along the north side (i. e. the side on which there was a bridge) of the train to fix the sticking brakes, as indeed Ventura actually did immediately after the accident. (R. 41, 46.)

Pauly could have discovered and fixed the sticking brakes from the north side (i. e. the side on which there was a bridge) as indeed Ventura actually did. (R. 46, 60.)

Chacra, where the accident happened, is merely a switch track siding. (R. 43, 44, 68, 69, 83, 84.)

Omissions and Misstatements of Facts in Petitioner's Statement of the Case

(1) *Petitioner stepped off the caboose without looking to see whether he had safe footing.*

Petitioner's brief, particularly on page 11, gives the impression that the petitioner looked effectively before dismounting from the caboose.

Pauly testified both in his deposition and on cross examination at the trial that he stepped off the caboose without looking. His deposition was taken on August 1, 1944, six months after the accident and less than two months before the trial. In it he testified over and over again that he did not look before he stepped down. The following answers from Pauly's deposition were admitted by him on cross examination to be true:

> Q. Did you look down there before you stepped?
>
> A. No, it was all black to me as if I was on the main line is all, on the side of the track. (R. 167.)

Pauly admitted this answer was true at R. 133, 134.

> Q. You didn't look before you stepped then?
>
> A. No, my idea was I was going to go down to the car and look at it as fast as I could while we were still stopped; I picked up the fusee, took my lantern, cracked the fusee and stepped right off. (R. 167.)

Pauly admitted this answer was true at R. 134.

> Q. Did you turn your lantern, the light of it, down below where you were going to step, before you stepped down?
>
> A. I had it lit; I didn't turn it downwardly; I would have the light in my hand; as I cracked the fusee I had it in my hand; I had this hand (indicating) on the hand rail of the caboose on this side; as I stepped down this hand would be here (indicating), the light would be here (indicating); as I stepped down you would figure you was on the ground ready to move. (R. 167).

Pauly admitted this answer was true at R. 134.

> Q. You didn't look down?
>
> A. No; you are standing on the end of the caboose like this (indicating), you crack the fusee, the lantern in your hand. (R. 167.)

Pauly admitted this answer was true at R. 134.

Q. You just stepped down?

A. I just stepped down. (R. 168.)

Pauly admitted this answer was true at R. 135.

Q. Without looking?

A. Yes, figuring that was the ground. (R. 168.)

Pauly admitted this answer was true at R. 135.

(2) *The record conclusively shows that petitioner would have seen the danger if he had looked.*

Pauly in his brief claims it was so dark that he couldn't see where he was stepping and attempted to justify his failure to see that he was stepping off into space by alleging in paragraph 6 of his complaint, "that owing to the weather conditions and the darkness of the night as aforesaid, it was impossible for plaintiff to discover or ascertain the facts with regard to the place where said caboose had been brought to a stop and plaintiff had no knowledge and did not know that the said caboose had been and was stopped upon said bridge." (R. 3.) There was no evidence to support this allegation. On the contrary the evidence affirmatively and without contradiction shows that Pauly could have seen if he had used his lantern or fusee and his eyesight which was good. (R. 101.) He testified that it was just commencing to snow and that it was not snowing enough to interfere with his vision. (R. 102.) He saw the fire flying from the sticking brake ten to fifteen cars (500-750 feet) ahead of the caboose. (R. 88.) He was able to check the engine number on Train No. 20 as it passed him. (R. 117.) He was able to see the mountains as he came down the track from Funston to Chacra. (R. 114.) Ventura, who dismounted only a few seconds before Pauly, was able to see where he was stepping and that it was safe. (R. 52.) The roadbed was slag but he was able to see it. (R. 52.) Ventura was using his lantern to illuminate his way as he walked back from the caboose to flag and was able to see his way all along there. (R. 53.) After the accident, when Ventura was in the creek bed some eighteen feet below the track, he was able to see the steps of the caboose. (R. 55.) Linkins

also was able to see the position of the caboose from the creek bed. (R. 74.) The head brakeman was able to see Pauly's red fusee a distance of eighty-six cars or substantially four thousand feet. (R. 76.) Moreover, Ventura was able to see the signal given by the head brakeman in response to the red fusee the same distance. (R. 55.)

A lantern just like Pauly's (R. 96) is in evidence as Exhibit 3 (Admitted in evidence at R. 154) and a standard yellow fusee was admitted in evidence at R. 158 to show the degree of light available to Pauly and will be made available by stipulation.

(3) *Petitioner was thoroughly familiar with the existence of the bridge between the tracks and thought about the danger of the south side of the bridge a very short time before dismounting.*

Petitioner's statement of the case would give the impression that at the time he dismounted he was oblivious of the fact that there was a bridge in his immediate vicinity.

Pauly, immediately before the accident, knew that he was in the close vicinity of this bridge but thought he had passed it by about three or four car lengths. (R. 108, 109.) Immediately after the accident he said, "I thought I was past the darned bridge." (R. 51.) He thought about the bridge when he was in the caboose a very short time before going to the front end and dismounting. (R. 112.)

Pauly had been crossing over this bridge for seven years, during which time he estimated: he had crossed the bridge 1000 times (R. 105); as many times in daylight as darkness (R. 106); had walked over the bridge between the tracks fifty times (R. 107); and in darkness had walked over the bridge between the tracks 10 times. (R. 108.) He had observed and knew that there was a foot walk between the tracks and that there was no foot walk or rails on the outside of the tracks. (R. 107.)

(4) *There was a wooden platform to the north of the main line track, on which petitioner's caboose stood, on which petitioner could have safely dismounted and crossed.*

Petitioner's statement of the case does not disclose this important fact. It is demonstrated in Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217 admitted in evidence R. 29) and in picture No. 10 of Exhibit I (R. 223, admitted in evidence R. 28.) The bridge is 11 feet 4 inches wide (R. 25) and is 92 feet 6 inches in length. (R. 25.) There is seven or eight feet clearance when both tracks are occupied by trains. (R. 50.) If petitioner had dismounted on this bridge by getting off on the north side of the caboose he would have been entirely safe and could have crossed the bridge on the way to his place of work.

(5) *The evidence without contradiction negatives Pauly's contention that he had to dismount on the south side because he saw fire from the south side; demonstrates that he could have made his examination for the sticking brake from the north side of the train; and establishes that he should have used the bridge on the north side of his caboose to dismount and cross the creek.*

Petitioner on page 11 states that the fire caused by the sticking brake was seen on the south side, and in accordance with established practice he alighted from that side to fulfill his duty of inspecting and repairing the brake. The contrary is true. The evidence shows without conflict that the identity of the sticking brake could be and actually was discovered from the north side of the train.

Ventura, testified that he actually found the sticking brake by looking for it on the north side of the train in spite of the fact that the fire had been seen flying from the south side (R. 46, 58, 59, 60); that they could tell from what they saw in the caboose that the fire was from a sticking brake (R. 47); that the fire was as bright as a yellow fusee (R. 48) and that it could be seen fifty cars away (R. 48); that when one brake sticks, all of them do (R. 49); that the truck on which there is a sticking brake can be detected from either side of the car. (R. 49.) On redirect examination counsel for plaintiff attempted to put words into the mouth of Ventura, who was his own witness, that there would be no smoke coming from the north side wheels. Ventura, however, testified positively that he discovered the sticking brakes from smoke

coming from wheels on the north side (the bridge side) of the train. (R. 60.) At R. 60 he testified:

> Q. The observation you made was with reference to smoke and odor, and that is all?
>
> A. Yes sir.
>
> Q. You don't know where it came from, do you?
>
> A. I know where the smoke come from, it was coming from the north side wheels.
>
> Q. How do you know?
>
> A. I seen them.

Ventura also testified without contradiction that no danger would be encountered in walking between the tracks to look for the sticking brake. (R. 50.) He also testified that if another train came by on the passing track he could step in between the cars of his train, thus having a safety zone every fifty feet. (R. 63.) He also testified that he knew his own train would not move. (R. 64.) This would be necessarily true because it was stopped by a red fusee from the rear and could not be moved until a signal was received from the rear end.

Pauly was the only other witness who testified on the subject and he also stated that when one brake is sticking all four are sticking because they are all controlled by the same brake cylinder, and that when one brake and wheel are hot and smoking, the others are also. (R. 148-150.)

(6) *The record establishes as matter of law that there was no passing train on the passing track when Pauly dismounted from the caboose.*

On page 11 and throughout the brief petitioner contends that one of the reasons he descended from the south side was because passenger train No. 20 was then passing on the north side. He pleaded it as his only excuse for getting off on the south side. (R. 3.)

This contention was completely rejected by the Supreme Court of Utah in the last paragraph commencing on R. 183

and ending on R. 184. It concluded that even giving Pauly the benefit of his "reconstructed testimony" Train No. 20 would have passed before Pauly stepped down. This is unquestionably so. Train No. 20 consisted only of an engine, baggage car, mail car, coach and sleeper—an engine and four cars. (R. 54.) It was going east and passed Ventura when he was walking back to flag. (R. 38.) Even if Pauly checked only the engine of No. 20 on the west end of the caboose, that short train would have passed him before he could light his fusee and dismount. But Pauly testified that he performed his duty of checking all the equipment in Train No. 20, as required by Rule 810. (R. 116, 117.) All of Train No. 20 would therefore necessarily have passed him before he even commenced to dismount. After that train passed no other train passed during the 40 to 45 minutes until the ambulance came and got Pauly. (R. 41.)

But Pauly definitely and positively testified that he was on the back platform of his caboose as Train No. 20 passed him; that while on the back platform he observed and checked the equipment in Train No. 20; and that after Train No. 20 had passed him and he had checked the equipment he went back into the caboose, put on his overcoat, went to the front platform with his lantern lighted, lighted the fusee and then stepped off the south side of the caboose step. His testimony is as follows:

> Q. At that time you were on the head end of the caboose, is that right?
>
> A. When I checked the train I was on the rear end.
>
> Q. When you checked the train you were on the rear end?
>
> A. That's right. When I said to the brakeman "I will go over and check that car while we are meeting another train." Evidently I knew they had our signal, they were going to stop there.
>
> Q. You were on the rear platform?
>
> A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat.

Q. That all happened after you checked the train?

A. That is, my going through the caboose to get my coat, yes.

Q. Putting on your overcoat?

A. Yes, I had no reason to have it on—still in the cupola; as I started to get down with it this train came through the passing track, so I stepped to the rear platform to check it and told my rear brakeman to take care of the hind end, "I will check this car now."

Q. When you say it was engine 802 did you then know it was train No. 20?

A. Yes.

Q. Why?

A. I checked the passenger equipment too; that is the usual passenger engine.

Q. Did you check the passenger equipment?

A. That's right.

Q. As it went by you?

A. Yes, that's right.

Q. When you were on the back platform?

A. Yes.

Q. What did the equipment consist of?

A. Baggage car, mail car, day coach and sleeper; four cars.

Q. Then after the train passed you going east you went back in the caboose and put on your overcoat and then went to the head end of the caboose, is that correct?

A. That is correct.

Q. Was there any other equipment in the passing track after train 20 passed you?

A. No, not right exactly then, no.

Q. Was there at any time that you saw?

A. No. (R. 163-164.)

At the trial petitioner's counsel, by shockingly suggestive questions, brought out that Pauly had "reconstructed" his evidence on this subject. (R. 138.)

However, Pauly on cross examination affirmed the truth of the evidence given on his deposition: that he checked train No. 20 from the rear end of the caboose (R. 123); that he checked the equipment of train No. 20 as it went by him (R. 126); that train No. 20 was checked by him to consist of four cars, baggage, mail, day coach and sleeper (R. 127); that after he checked train No. 20 from the back platform he went into the caboose and got his coat (R. 126); and that he saw no other equipment on the passing track at that time. (R. 128.)

(7) *There is no evidence that any Safety Rule required petitioner to dismount from the south side of the caboose.*

On page 11 petitioner asserts that Ventura and Pauly dismounted on the south side "in compliance with safety rules," reference being made to R. 38, 39. It will be found that Ventura merely testified as follows:

Q. The south side. Have you had, as brakeman, any instructions with reference to the side from which to dismount?

A. Yes sir, its the best to mount on which side is the safest.

Q. Which would be the safest side?

A. The left side.

Q. Why?

A. Because there was a train coming down the pass, might fall, and fall right into the wheels of the train.

Q. And so you dismounted, as you say, from the left side?

A. Yes sir.

Ventura made no mention of any Safety Rule.

On page eleven also it is stated that the petitioner prepared to alight from the train on the south side because the Safety Rules required it and reference is made to page 90 of the record. The only evidence by the petitioner on the subject of rules is as follows:

> Q. During the years that you have worked for the defendant here as brakeman and as conductor, have you ever had, or received any instructions with reference to the proper side of the train from which to alight under different circumstances?
>
> A. Well, safe course is the course to pursue; one of the rules of the company, always pursue the safe course.
>
> Q. Under that rule which would be the safe side to alight from, if the train were stopped on the main line track at Chacra?
>
> Q. At night.
>
> A. Left side of the train.

There is no other evidence on the subject.

(8) *There is no evidence that trains customarily stopped or were inspected or repaired at Chacra. The only evidence is that Chacra was a passing track where trains pass and where emergency work might be done.*

Plaintiff alleged that freight trains "were customarily and ordinarily stopped upon defendants' main line and passing tracks" and that it was "usual, customary and necessary for members of various train crews to pass along said trains" for the purpose of examining trains. (R. 4.)

Petitioner on pages 8 and 10 assumes that these allegations were proved.

The Supreme Court of Utah carefully scrutinized the record, was unable to find any such evidence and so declared. (R. 173-175, 178.) It summed up the evidence and record as

demonstrating, without conflict, that Chacra was nothing but a passing track.

Respondents fully discuss the evidence and record under II herein and will not repeat the discussion at this point.

I

The Supreme Court of Utah Properly Set Aside the Jury's Verdict and Dismissed the Petitioner's Case because the Verdict of the Jury was not supported by Substantial Evidence.

Herein of Petitioner's Point I.

This court has repeatedly and recently ruled that under the F. E. L. A. there must be evidence of negligence on the part of the defendants and such negligence must be a proximate cause of the accident and injury.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232. Decided Dec. 20, 1943. The decedent was killed by a car on which he was riding running over a derail switch. There was a failure of evidence as to what person set the derail which caused the accident, whether Brady or some other person. The court held that a verdict was properly directed for the defendant. On pages 479 and 480 the court said:

> * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409. Jan. 17, 1944. On page 32 the court said:

> In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove

that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 451, 143 A. L. R. 967.

Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444. On page 67 the court said:

> They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the accident.

II

The Supreme Court of Utah properly held that there was no Evidence of Negligence by the Railroad in failing to exercise reasonable care in furnishing Petitioner with a safe place of work.

Herein of Petitioner's Point II.

The only allegation by petitioner that defendants failed to exercise due care to furnish him a safe place to work is in subparagraph B of paragraph 9. (R. 4.) It charges that the Railroad failed "to build, construct and maintain a walk with handrails on the side of the bridge" and failed to provide any lights or markers to indicate the presence or dimensions of said bridge and failed by any means to protect employees against the dangers of the bridge. (R. 4.)

Petitioner sought to force his case into the frame work of *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062. But in that case the decedent was required to do work while standing on the bridge from which he fell. Pauly, on the other hand, had no work to do while on the bridge. On the contrary his immediate duty was to proceed westerly ten to fifteen car lengths (500 to 750 feet), there to eliminate sticking brakes. Moreover, there was a perfectly safe way for Pauly to get to his place of work. He could dismount on the north side of his caboose on the platform for that purpose and proceed safely to his place of work.

Inasmuch as Pauly had no work to do on the south side of the bridge where he dismounted, he was reduced to the necessity of claiming that every place in Chacra, including the place from which he fell, was such that there must be a safe walk-way, so that he would be caught when he dismounted without looking. Petitioner makes that contention on page 17 and claims that the evidence of Ventura, Linkins and Pauly supports it. (See page 15.) He contends that all three of them testified that "this territory was a place of work." No reference to the record for such extraordinary evidence is given. None such was given. It would have been objectionable as a conclusion of law.

All of Ventura's evidence on this subject will be found at R. 43, 44; Linkins' at R. 68, 69; and Pauly's at R. 88, 89.

That evidence was carefully considered and analyzed by the Supreme Court of Utah at R. 174, 175, 177 and it is submitted that it is correctly summarized at R. 177 and 178 as follows:

> The engineer, Linkins, did not so testify. The inference from all the other testimony as to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line.

The bridge at Chacra might have become a place of work under certain circumstances. Suppose for example a car had to be dumped, as in the Bailey case, and the employee had to stand on the south side of the bridge to manipulate the dumping mechanism, it would have become a place of work. Or suppose the fire on the trouble car was caused by a *hot box* on the south side (as Justice Turner erroneously assumed in the case at bar, R. 195) and that car stopped on the bridge so that to fix the hot box Pauly had to work while on the ties

or stringer on the south side of the Chacra bridge, it might well be as to him under those facts a place of work.

But merely because a certain spot on a railroad is a place of work under certain facts and circumstances, it does not follow that it is such under all facts and circumstances. Thus in the *Bailey* case, suppose there was no car on the bridge and the decedent, instead of standing on the edge of the bridge to manipulate the dumping mechanism was merely crossing from one side of that bridge to the other to get to the place where he was to work and, instead of using a perfectly safe platform walk between the rails was walking along that same stringer and fell therefrom. Obviously that stringer would not be a place of work as to him under those circumstances.

It is uncontradicted that Pauly's only purpose was to proceed to the car with the sticking brakes and cut out the air brakes on that car. This could have become necessary any place on the railroad. It did not pertain particularly to a passing track. This train went as far as the side track at Chacra only because it was near at hand. (R. 70, 86.) Otherwise it would have been stopped on the main line between stations. Pauly had no work to do on the bridge. (R. 88.) He would use the bridge only to cross the creek to the car with sticking brakes. To do this he had a perfectly safe walk way between the main line and passing tracks.

If the railroad was required to regard this bridge as a place of work which it must keep safe so that conductors could back off cabooses without looking, it would follow that every foot of ground, not only in the Chacra siding but over the entire railroad, would have to be kept in like condition. A brake may stick any place on the railroad. If it sticks and is sufficiently dangerous, the train must be stopped out on the main line where there is no siding at all. It might be stopped on trestles, mountain sides, etc. (R. 133.) It merely happened that this sticking brake was seen at a time when the train was close to the Chacra siding and under such circumstances that the trainmen concluded they could safely go on to that siding.

No authority supports petitioner's contention. He relies primarily on *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S.

350, 87 L. Ed. 1030, 63 S. Ct. 1062. The difference between the two cases is pointed out above.

A recent case which distinguishes the *Bailey* case on facts much like those in the case at bar is *Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 557 (N. H. Sept. 1943). Kenney was killed while serving as head brakeman of a freight train, when he stepped into space from the side ladder of a box car which had been stopped on a bridge which had no walk or guard rail. The deceased gave the signal to stop. After the stop the engineer saw the deceased with his lighted lantern climb down the side of the car and fall into the creek below.

The plaintiff contended that the Railroad was negligent in not providing the bridge, as a work place, with a cat walk and a rail. The Supreme Court of New Hampshire held as matter of law that there was no duty on the part of the railroad to anticipate that Kenney would use the bridge as a work place. The court said on page 560:

> Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe as a work-place being anticipation (cf. D'Ambrosio v. Boston & M. R. R., 81 N. H. 119, 124 A. 551) no duty in that respect can be found. The bridge was not a workplace in the sense that might perhaps have been found if the shifting operations were likely to result in a car standing on the bridge.

Although the Supreme Court of Utah was unwilling to regard *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, as a controlling authority (see pages 178, 179), nevertheless the holding of this court in that case as follows:

> "If negligence caused the injury, it was exclusively that of respondent" (the brakeman and plaintiff)

negatives petitioner's contention that failure to have a wa
or other device to catch trainmen who dismount without loo
ing is a failure to furnish a safe place of work. It was so r
garded in the *Kenney* case.

In addition to the *Bailey* case, Petitioner relies on *Ca*
man v. *Pennsylvania-Reading Seashore Lines*, 110 Fed. (2
832, (3rd C. C. A.), *Bly* v. *Southern Railway*, 183 Va. 16
31 S. E. (2d) 564, rehearing denied, 183 Va. 406, 32 S.
(2d) 659; *Bimberg* v. *Northern Pacific Railway Compan*
217 Minn. 187, 14 N. W. (2d) 410, (certiorari denied, 323
S. 752, 89 L. Ed. 602, 65 S. Ct. 87; *Rashaw* v. *Central Vermo*
Railway, Inc., 133 F. (2d) 253 (2 C. C. A. 1943); *Murphy*
Boston and Maine Railroad, —— Mass. ——, 65 N. E. (2
923.

The *Cawman* case was regarded, correctly it is submitte
by the Supreme Court of New Hampshire in the *Kenney* ca
and by the Supreme Court of Utah in the *Pauley* case (see
181) as without authority because it is impossible to unde
stand either basic facts or the charge of negligence.

The *Bly* case is readily distinguishable because Bly ha
to dismount from the caboose for the purpose of back flaggin
the caboose steps extended out beyond the edge of the trest
on both sides; Bly, encumbered with his signaling imped
menta, had to swing around the end of the caboose platfor
from the steps in order to get on to the bridge. He fell dow
under the steps of the caboose where it had stopped and wa
killed. The court indulged the presumption of due care appli
able in death cases and not applicable in such cases as Pauly'
where Pauly took the witness stand and testified that he di
not use any care whatever. He could have descended betwee
the tracks on a perfectly safe bridge.

The *Bimberg* case is within the doctrine of the *Baile*
case. The decedent under direction from his superior wa
working on the bridge, using a lining bar to straighten th
railroad track. He could not be elsewhere.

In the *Rashaw* case it was necessary for the decease
brakeman to cross the bridge as he did cross and the bridg
was not in standard condition, that is, it was under repair an
was covered with ice.

In *Murphy* v. *Boston and Maine R. Co.*, the court concluded that decedent fell from a sea wall along which he had to pass to reach his engine, unprotected by a guard rail. This case is like the *Rashaw, Bly* and *Bimberg* cases as distinguished from the *Kenney* and *Berry* cases and the case at bar.

There is no evidence that the absence of lights or markers on the bridge constituted negligence.

The allegation regarding lack of lights comes to nothing because there is no evidence that the Denver and Rio Grande Western or any other railroad in the United States has ever placed or maintained lights or markers in such position.

Ventura and Linkins testified on direct examination that there were no lights on the bridge. On cross-examination Ventura testified that there never are any lights on bridges or along passing tracks; that it is always left to trainmen to see conditions by their lanterns; and that railroads furnish electric lanterns, batteries and light globes for their use. (R. 44.) Linkins also on cross-examination testified that railroads never have lights on bridges to illuminate the bridges. (R. 73.) There is no evidence to the contrary of that of Ventura and Linkins.

Petitioner makes no contention that there is any evidence in the record that it was customary for the Railroad to equip bridges situated like the Chacra bridge with foot walks and handrails.

Therefore, respondents will refrain from discussing the record on that subject.

III

The Supreme Court of Utah correctly held that there was no evidence that the Railroad should, in the exercise of reasonable care, have anticipated that an experienced Conductor would back off a Caboose without looking and provide facilities to catch him.

Herein of Petitioner's Point III.

Petitioner expresses consternation at such a holding. It is elementary in the law of torts. This court recently reiterated the doctrine.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.

The court held that it was not reasonably to have been anticipated that the condition of the derailer and worn rail would cause the accident. On page 483 the court said:

> * * * Bare possibility is not sufficient. Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, at page 475, 24 L. Ed. 256; "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Events too remote to require reasonable provision need not be anticipated.

On page 484 the court said:

> The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

This court in the *Brady* case also pointed out that a railroad is not obligated to furnish an absolutely safe place of work but only one that is reasonably safe.

It held that although it was a bare possibility that striking a derailer from an unexpected direction would cause an accident that it was so unusual that provision to guard against it was beyond the requirements of due care. On page 483 the court said:

> The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view

that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree. Bare possibility is not sufficient.

An accident and injury are always possible. Merely because an accident occurs and an injury is suffered is no evidence of negligence.

Throughout his brief petitioner argues that if the bridge at Chacra had had guard rails or a walkway or lights on the south side the petitioner would not have been injured. This is the typical "hind sight" argument which runs all through petitioner's brief—the defendant was negligent because the place of work must have been dangerous because petitioner fell and if the place had not been dangerous petitioner would not have fallen. It reasons in a circle and begs the question. Moreover, it is pure speculation to assert that Pauly would not have been injured if there had been a walk and rail. It would depend on how wide the walk might be, the position of the rail, and how he stepped and landed. It is within the realm of reasonable speculation that he might have received just as bad injuries as in fact he did.

Petitioner's contention comes to this, that the railroad should anticipate that an experienced conductor, with seventeen years experience as a railroad trainman, knowing of the rule that he must look for a safe place to alight before stepping off trains, would in violation of that rule, and with ample facilities to see, knowing that he was near and might be on the bridge, back off the train without looking, and that the railroad should have either a walk with a rail to catch him or hang life nets over the edge of the right of way if nothing else would be feasible.

On page 11 petitioner makes the argument that the south side was the safe and proper side from which to alight. His own evidence proves that that was not his judgment. He thought about the bridge and thought he had passed it. (R.

108, 109.) After the accident he exclaimed that he thought he was past the "darned bridge." (R. 51.) Except for his mistake or inadvertence, the inference is clear that he wouldn't have stepped down on the south side but would have stepped down on the platform to the north.

Pauly's complaint recognizes that he would not have dismounted on the south side but would have used the safe passage way over the creek on the north side of his train except that he alleged that train No. 20 was passing. His only allegation explaining why he chose to step off on the south side is that Train No. 20 was passing and therefore it was dangerous to get off on the north side. (R. 3.) As the record demonstrates Train No. 20 had passed when he dismounted.

IV

The Supreme Court of Utah correctly held that a verdict should have been directed because the sole proximate cause of the accident was Pauly's own negligence.

Herein of Petitioner's Point IV.

If negligence of respondents was not a proximate cause and if the sole proximate cause of the accident was petitioner's own negligence, there can be no recovery under the F. E. L. A.

This Court in the *Brady* case said on page 484:

> The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

Kenney v. *Boston & Maine R. R.*, 33 Atl. (2d) 557 (N. H. Sept. 1943). The facts are stated under the previous heading. On Page 561 the court said:

> * * * If he had known where he was and had stepped off as he did, his negligence would have been the sole proximate cause of his injuries and death.

So also in *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, the court on page 512 said:

> * * * If negligence caused the injury it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-59).

The test laid down by the *Brady* case is whether the alleged negligence of the railroad in not having a footwalk and handrail on the south side of the bridge, in addition to the platform on the north side, is a link in an unbroken chain of reasonably foreseeable events. If the chain of events was not reasonably foreseeable by the railroad, its failure to have a footwalk and handrail is not the proximate cause of the accident.

Under III it is argued and submitted that it was not reasonably to be anticipated or foreseen that Pauly would behave as he did. If so, then the undoubted negligence of Pauly in violating rules of the company and stepping off the caboose without looking was the sole proximate cause of the accident.

Is it reasonable to require the railroad to anticipate that Pauly would violate its rules? Is it not reasonable for the railroad to anticipate that Pauly would comply with its rules? If Pauly had complied with either of two rules this accident would not have occurred. If he had descended from the rear end of the caboose as required by Safety Rule 3 (R. 7, 130, admitted in evidence R. 131) he would not have been injured. If he had looked out for a safe footing before stepping down from the caboose, as required by Safety Rule 3, he would not have been injured.

In the *Kenney* case it is said that if Kenney had known where he was and stepped off as he did, that his negligence would have been the sole proximate cause of the accident. No one would contend the contrary. But Pauly knew where he was. He knew that he was in the near vicinity of this bridge. He thought about the bridge and the danger of it when he was in the caboose just before he went to the front platform and stepped off. To be sure, he thought he was three or four car

lengths past the bridge. Of course, he could not be certain of that and knew that he could not be certain of it. Nevertheless he backed off the caboose without looking. It is submitted that Pauly's negligence was the equivalent in legal effect of stepping off the caboose in spite of the fact that he knew where he was, and that his behavior is within the doctrine of the *Kenney* case.

For those reasons Pauly's violation of the safety rules was the sole proximate cause of the accident.

CONCLUSION

It is respectfully submitted that the petition should be denied.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 443

HARRY O. PAULY,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,

Respondents.

BRIEF OF RESPONDENTS

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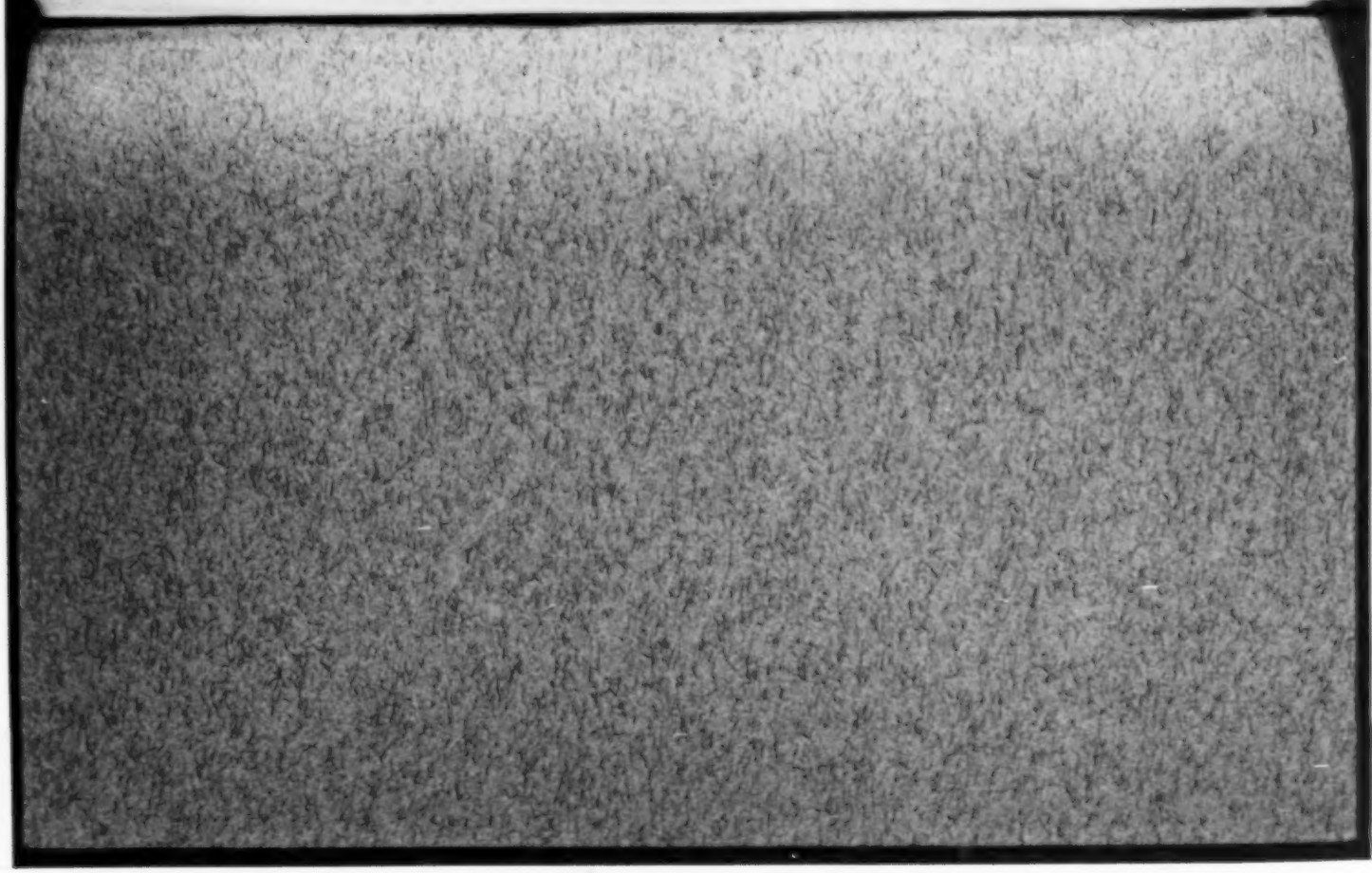

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BRIEF OF RESPONDENTS

PRELIMINARY NOTES AND REMARKS

A lantern such as Pauly carried at the time of the accident, Exhibit 3, was admitted in evidence and is with the record (R. 202). A ten minute yellow fusee, such as Pauly carried, was admitted in evidence and will be delivered to the Clerk by stipulation (R. 202, 203).

All italics are added.

The Supreme Court of Utah has manifested a sincere, conscientious and intelligent disposition to apply the Federal

Employers' Liability Act strictly in accordance with the applicable decisions of the Supreme Court of the United States.

Petitioner throughout his brief is abusive to the Supreme Court of Utah and makes the wholly unwarranted charges that it follows a policy of frustrating the operation of a Federal statute and ignoring and refusing to follow the decisions of the United States Supreme Court. The actions of counsel for the petitioner belie this charge, else why do they select Utah as the forum in which they institute F. E. L. A. cases arising in States other than Utah in favor of citizens of States other than Utah?

See:

Ehalt v. *McCarthy*, 104 Utah 110, 138 P. (2d) 639. Ehalt was a resident of Denver and was injured while working in Denver.

Bruner v. *McCarthy*, 105 Utah 399, 142 P. (2d) 649. Bruner was a resident of Grand Junction, Colorado, and was injured while working in Colorado.

Allison v. *McCarthy*, 106 Utah 278, 147 P. (2d) 870. Allison was a resident of Colorado and was injured while working near the Royal Gorge in Colorado.

Pauly v. *McCarthy*, 166 P. (2d) 501 (not yet reported in Utah Reports). Pauly was a resident of Grand Junction, Colorado, and was injured while on duty near Glenwood Springs, Colorado.

Ayers v. *Union Pacific Railroad Co.*, decided Dec. 1946, not yet reported. Ayers was a resident of Wyoming and was injured at Cheyenne, Wyoming.

In three out of five of these cases decided since the Tiller case, the Utah Supreme Court held that directed verdicts for defendants were improper.

The foregoing are only a few of the many cases that counsel for this Petitioner have filed and are filing in the Utah courts under the Federal Employers' Liability Act against the various railroads, involving accidents to residents of foreign States, occurring in foreign States.

A reading of the five cases above cited will demonstrate a disposition on the part of the Supreme Court of Utah conscientiously to apply the Federal Employers' Liability Act according to the applicable decisions of the United States Supreme Court, having full regard to the broadening of the Act which has followed the decisions commencing with *Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444.

Petitioner contends that the Supreme Court of Utah is "not in accord with the holding of this Court in the *Tiller* case—" in regard to assumption of risk. It is submitted that the Utah court in the *Pauly* case manifested complete sympathy with the decision in the *Tiller* case regarding assumption of risk and that its decision is in no way based upon assumption of risk. The court referred to assumption of risk as "a cruel doctrine" and stated that it was fortunate that it had been "forever abolished in the railroad industry" (R. 185).

Petitioner asserts that the labored reasoning of the majority opinion demonstrates that it was laboring to defeat plaintiff's action. On the contrary, it is submitted that the writer was trying to find some judgelike and lawyerlike way to support the verdict and had been unable to do so.

The Supreme Court has shown a most tolerant and forbearing attitude toward petitioner in view of his flagrant misconduct in attempting to "reconstruct" his evidence to his own advantage.

As will be shown in the statement of the case, Section (6), the record establishes as matter of law that there was no passing train on the passing track when Pauly dismounted from the caboose. Such was his evidence both on deposition and on cross examination at the trial. Nevertheless at the trial petitioner's counsel, by shockingly leading and suggestive questions, brought out that Pauly had "reconstructed" his evidence on this subject. At R. 138 the following transpired:

> Q. By the way, these depositions that Mr. Van Cott has called to your attention here, those depositions was taken some six months after you were injured, was it not?
>
> A. Yes, sir.

Q. You may state whether or not since that time you have made any effort to reconstruct in your own mind the events and particulars of the occasion when you got injured?

A. Yes, sir, I have.

Q. Has your thought on that matter refreshed your recollection?

A. It has, very much.

Q. Will you tell the jury now under your oath whether or not you were on the east end of the caboose or the west end of the caboose when you checked Train No. 20?

A. I was on the west end of the caboose.

Q. And so when you stated in your depositions that you were on the east end of the caboose, you were in error?

Mr. Van Cott: Just a moment, I object to counsel leading his witness on this vital point.

The Court: Objection sustained.

Q. Were you in error when you stated on August 2nd of this year that you were on the east end of the caboose when you checked this Train No. 20?

Mr. Van Cott: That is the same question, if the Court please, leading.

The Court: He may answer.

A. That is an error.

It will be observed that the fact of "reconstruction" and the substance of the "reconstruction" of evidence were both placed in the mouth of Pauly by shockingly leading and suggestive questions.

The Supreme Court of Utah might well have applied a much harsher expression than "reconstruction" to this effort by Pauly (under questions from his counsel) to depart from the truth and change his evidence. That the court did not take a more drastic view, with appropriate action, manifests a tolerance and forbearance to Pauly's case which entirely refute the vituperative remarks in Pauly's brief.

STATEMENT OF THE CASE

Respondents are constrained to make a statement of the case, because Petitioner misstates and omits important evidence and facts.

Pauly, an experienced railroad conductor, was injured when he stepped off and dropped from a standing caboose (R. 92) in the night time without looking for safe footing (R. 133-135), in violation of Safety Rule No. 3 of the Company reading:

> "Before getting on or off equipment, employees must look out for safe footing—." (R. 7, 130, admitted in evidence R. 131.)

Pauly knew this rule and knew it was necessary to look for safe footing before stepping down. (R. 132.) There was no footing whatever where he stepped off, because the south step of the caboose was almost flush with the south ends of the ties of the bridge. (R. 30.) He dropped off into space and fell 17 feet to the bottom of the creek. (R. 92.)

Pauly, if he had looked, could have seen that there was no footing and that he would drop into the creek bed. (R. 52, 53, 55, 74, 76, 88, 101, 102, 114.) He had in his hands when he stepped off, a lighted electric hand lantern (R. 91) and a lighted yellow fusee (R. 91), either of which, if he had looked, would have disclosed the situation and danger. (R. 52, 62, 157.)

Pauly was thoroughly familiar with the bridge, the platform on the north side and the absence of a bridge on the south side (R. 106, 107). Pauly thought about the danger of the bridge only a few seconds before he dropped off (R. 108) and realized he was near it, but guessed that he was past the bridge by three or four car lengths, (R. 109) (150 to 200 feet) (R. 38), and acting upon that guess dropped off without looking.

Pauly had no work to do on or near the bridge itself. (R. 88.) The west bound train had been brought to a stop at Chacra because shortly before reaching there Pauly, his rear flagman Ventura, the Engineer Linkins and the head brakeman all

knew that brakes were sticking, causing fire, on a truck of a car in the train. (R. 36, 69, 86.) Pauly thought that the car in question was ten to fifteen car lengths (500-750 feet) ahead of the caboose. (R. 88.) It was Pauly's duty as soon as the train was stopped to dismount from the caboose and walk from 500 to 750 feet westerly to the car that was in trouble and eliminate the sticking brakes. (R. 88.) Pauly had no work to do at the bridge. On the contrary it was his duty, as he himself testified, to proceed forthwith to the car that was in trouble to fix it. (R. 88.)

When the engineer first became aware of the sticking brakes and the necessity of stopping, the engine was "just about at the east switch at Chacra." (R. 76.) He merely proceeded easterly a little more than the length of the train before stopping.

The train stopped on the main line which was the southerly of the two tracks. North of it was the passing track. The space between the two tracks was completely covered by a plank footwalk, 12 feet wide with 7 to 8 feet clearance if trains occupied both tracks. (R. 50.) Pauly could have dismounted on it and crossed over the bridge on it on his way to the car with the sticking brakes. Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217, admitted in evidence R. 29), Exhibit I (R. 223, admitted in evidence R. 28). Pauly, stepped off on the other side, the south side where there was no footwalk. (R. 92.)

Pauly's train was stopped and there was no train on the passing track when Pauly stepped down. Nor was there any train on the passing track while Ventura, after the accident, walked forward twenty to twenty-five carlengths, 1000 to 1250 feet, and then returned to the caboose. (R. 41, 46.)

Pauly could have proceeded safely along the north side (i. e. the side on which there was a bridge) of the train to fix the sticking brakes, as indeed Ventura actually did immediately after the accident. (R. 41, 46.)

Pauly could have discovered and fixed the sticking brakes from the north side (i. e. the side on which there was a bridge) as indeed Ventura actually did after the accident. (R. 46, 60.)

Chacra, where the accident happened, is merely a railroad siding. (R. 43, 44, 68, 69, 83, 84.)

Omissions and Misstatements of Facts in Petitioner's Statements of Facts

(1) *Petitioner stepped off the caboose without looking to see whether he had safe footing.*

Petitioner's brief attempts throughout to give the impression that the petitioner looked effectively before dismounting from the caboose.

Pauly testified both in his deposition and on cross examination at the trial that he stepped off the caboose without looking. His deposition was taken on August 1, 1944, six months after the accident and less than two months before the trial. In it he testified over and over again that he did not look before he stepped down. The following answers from Pauly's deposition were admitted by him on cross examination at the trial to be true:

> Q. Did you look down there before you stepped?
>
> A. No, it was all black to me as if I was on the main line is all, on the side of the track. (R. 167.)

Pauly admitted this answer was true at R. 133, 134.

> Q. You didn't look before you stepped then?
>
> A. No, my idea was I was going to go down to the car and look at it as fast as I could while we were still stopped; I picked up the fusee, took my lantern, cracked the fusee and stepped right off. (R. 167.)

Pauly admitted this answer was true at R. 134.

> Q. Did you turn your lantern, the light of it, down below where you were going to step, before you stepped down?
>
> A. I had it lit; I didn't turn it downwardly; I would have the light in my hand; as I cracked the

fusee I had it in my hand; I had this hand (indicating) on the hand rail of the caboose on this side; as I stepped down this hand would be here (indicating), the light would be here (indicating); as I stepped down you would figure you was on the ground ready to move. (R. 167.)

Pauly admitted this answer was true at R. 134.

Q. You didn't look down?

A. No; you are standing on the end of the caboose like this (indicating), you crack the fusee, the lantern in your hand. (R. 167.)

Pauly admitted this answer was true at R. 134.

Q. You just stepped down?

A. I just stepped down. (R. 168.)

Pauly admitted this answer was true at R. 135.

Q. Without looking?

A. Yes, figuring that was the ground. (R. 168.)

Pauly admitted this answer was true at R. 135.

Pauly's admissions on cross-examination were subsequent to his evidence referred to on page 6 of his brief. No attempt was made to rehabilitate Pauly after cross examination on this point.

The evidence relied on by plaintiff on page 6 is at best extraordinarily weak because it does not justify any inference of *looking effectively* or even *attempting to look effectively.* It is merely that he "glanced down." At most it would be a mere scintilla of evidence. Under the F. E. L. A. there must be more than a scintilla of evidence.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232. Dec. 20, 1943. On page 479 the court said:

> • • • *The weight of the evidence under the Employers' Liability Act must be more than a scintilla*

before the case may be properly left to the discretion of the trier of fact—in this case the jury.

But, assuming that such weak evidence is entitled to any weight or to be regarded as more than a scintilla if standing alone, its effect was entirely destroyed by the above described cross examination. Contrary to plaintiff's vehement contentions, it is not the law that he can create questions for the jury by his own self contradictions.

UNDER THE LAW THE COURT SHOULD CONSIDER THAT PORTION OF A PARTY'S TESTIMONY TRUE AS BEARS MOST STRONGLY AGAINST THE PARTY'S INEREST.

Fowler v. *Pleasant Valley Coal Co.*, 16 Utah 348, 52 Pac. 594. Plaintiff was injured by coal falling from the roof of defendant's mine. At one place he testified that his foreman assured him that the ceiling was safe and that he relied upon that assurance and believed it. In another place he testified that he considered the place dangerous and so thought immediately before the happening of the accident. The court held that there was no question for the jury. On page 596 it said:

> * * * *If there be a contradiction, it arises from the plaintiff's own testimony. In such a case, where a nonsuit is asked, the trial court may consider such testimony true as bears the most strongly against the interest of the plaintiff.*

Casey v. *Northern Pac. Ry. Co.*, 60 Mont. 56, 198 Pac. 141. In this case plaintiff contradicted himself at the trial, contradicted the allegations of his verified complaint and was contradicted by his previous statements. On page 145 the court said:

> It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements. A party testifying in his own behalf has no right to be deliberately self-contradictory, and whenever he is so the courts are justified in judging his case from that version of his testimony which is least favorable to

him. Atlanta R. etc., Co. v. Owens, 119 Ga. 833, 47 S. E. 213.

The principle of the *Fowler* case is well-settled law and further citations will not be added.

IT IS ALSO WELL-SETTLED LAW THAT WHERE A PARTY TO AN ACTION TESTIFIES TO SOMETHING THAT PREJUDICES HIS CASE OR PUTS HIM OUT OF COURT, HE IS NOT PERMITTED THEREAFTER TO TESTIFY TO THE CONTRARY.

Smith v. *Boston Elevated Ry. Co.*, 184 Fed. 387, (1st C. C. A.). Plaintiff sued defendant for personal injury sustained while a passenger and at the first trial testified that at the time the train started she was in a position of unstable equilibrium. On the first appeal the First Circuit Court of Appeals held that under such circumstances she could not recover and reversed. At the second trial she testified that she was braced against the starting of the train. The court held that she would not be permitted to change her testimony. On page 389 the court said:

> As the inconsistency is in the testimony of a party, a stricter rule is applicable than where the inconsistency is in the testimony of an ordinary witness. Previous inconsistent statements of a witness other than a party ordinarily go merely to the credit of the witness, and upon a second trial it may be left to a jury to decide which of the inconsistent statements is to be credited. *The sworn testimony of a party, who has control of his case, with power to bind himself conclusively by pleadings, stipulations or admissions, as to facts resting upon his own knowledge, is of such solemn character that in the absence of a clear showing of mistake inadvertency, or oversight, it should ordinarily be regarded as precluding him from seeking to establish before another jury an inconsistent state of facts.*

Pauly's evidence that he glanced down is wholly uncorroborated.

Davis v. *Woolworth Co.*, 60 Fed. (2d) 344 (10th C. C. A.). Davis sued for injuries resulting from a fall down an elevator shaft. He was working for the defendant. At the first trial he testified that he stepped into the shaft without looking to see whether the elevator was on that floor. The first trial was decided against him. At the second trial he testified that he did look to see whether the elevator was on the floor and was unable to see. In regard to this the court on page 346 said:

> In view of the many decisions on this subject, we are constrained to hold that the right of the plaintiff below to go to the jury on his diametrically opposed evidence on the vital question in this case, uncorroborated, leaves no room for doubt that the action of the trial court in directing a verdict was right and must be affirmed.

It is submitted that the Supreme Court of Utah correctly decided that Pauly did not give any substantial explanation of his change of testimony. (R. 184.)

(2) *The record conclusively shows that petitioner would have seen the danger if he had looked effectively.*

Pauly in his brief claims it was so dark that he couldn't see where he was stepping and attempted to justify his failure to see that he was stepping off into space by alleging in paragraph 6 of his complaint, "that owing to the weather conditions and the darkness of the night as aforesaid, it was impossible for plaintiff to discover or ascertain the facts with regard to the place where said caboose had been brought to a stop and plaintiff had no knowledge and did not know that the said caboose had been and was stopped upon said bridge." (R. 3.) There was no evidence to support this allegation. On the contrary the evidence affirmatively and without contradiction shows that Pauly could have seen if he had used his lantern or fusee and his eyesight, which was good. (R. 101.) He testified that it was just commencing to snow and that it was not snowing enough to interfere with his vision. (R. 102.) He saw the fire flying from the sticking brake ten to fifteen cars (500-750 feet) ahead of the caboose. (R. 88.)

He was able to check the engine number on Train No. 20 as it passed him. (R. 117.) He was able to see the mountains as he came down the track from Funston to Chacra. (R. 114.) Ventura, who dismounted only a few seconds before Pauly, was able to see where he was stepping and that it was safe. (R. 52.) The roadbed was slag but he was able to see it. (R. 52.) Ventura was using his lantern to illuminate his way as he walked back from the caboose to flag and was able to see his way all along there. (R. 53.) After the accident, when Ventura was in the creek bed some eighteen feet below the track, he was able to see the steps of the caboose. (R. 55.) Linkins also was able to see the position of the caboose from the creek bed. (R. 74.) The head brakeman was able to see Pauly's red fusee a distance of eighty-six cars or substantially four thousand feet. (R. 76.) Moreover, Ventura was able to see the signal given by the head brakeman in response to the red fusee the same distance. (R. 55.) Petitioner so states on page 4 of his brief.

Pauly, evidently conscious of the weakness of the contention that he couldn't see, attempted to take the position that he didn't use the light because it was not designed to see with but only for the purpose of making signals. (R. 139, 140.) This statement seems so ridiculous that it needs no refutation. However, it is noteworthy that Ventura used his lantern when he dismounted, saw the ground with it, found safe footing and made a safe landing. (R. 53.)

Moreover, Pauly testified that it was necessary under the rule and for his own safety to look down and that it has been his practice all through his railroad experience to look before he stepped down from equipment. (R. 133.)

The record demonstrates that Pauly's excuse of darkness for his failure to observe is without substance. The fact is that he didn't see because he didn't look.

A lantern just like Pauly's (R. 96) is in evidence as Exhibit 3 (admitted in evidence at R. 154) and a standard yellow fusee was admitted in evidence at R. 158 to show the degree of light available to Pauly and will be made available by stipulation.

(3) *Petitioner was thoroughly familiar with the existence of the bridge between the tracks and thought about the danger of the south side of the bridge a very short time before dismounting.*

Petitioner's statement of the case would give the impression that at the time he dismounted he was oblivious of the fact that there was a bridge in his immediate vicinity.

Pauly, immediately before the accident, knew that he was in the close vicinity of this bridge but thought he had passed it by about three or four car lengths. (R. 108, 109). Immediately after the accident he said, "I thought I was past the darned bridge." (R. 51.) He thought about the bridge when he was in the caboose a very short time before going to the front end and dismounting. (R. 112.)

Pauly had been crossing over this bridge for seven years, during which time he estimated: he had crossed the bridge 1000 times (R. 105); as many times in daylight as darkness (R. 106); had walked over the bridge between the tracks fifty times (R. 107); and in darkness had walked over the bridge between the tracks 10 times. (R. 108.) He had observed and knew that there was a foot walk between the tracks and that there was no foot walk or rails on the south side of the tracks. (R. 107.)

(4) *There was a wooden platform to the north of the main line track, on which petitioner's caboose stood, on which petitioner could have safely dismounted and crossed the creek.*

Petitioner's statement of the case does not disclose this important fact. On page 4 he states that there was no footwalk, platform or guard rail on "the south side of the bridge," without mentioning that there was a platform on the north side. Petitioner persisted in this omission in spite of having his attention called to it in Respondent's Brief Opposing Petition for Certiorari, pages 8 and 9. The fact is demonstrated in Exhibit E (R. 207, admitted in evidence R. 28), Exhibit M (R. 217 admitted in evidence R. 29) and in picture No. 10 of Exhibit I (R. 223, admitted in evidence R. 28.) The bridge is 11 feet 4 inches wide (R. 25) and is 92 feet 6 inches in

length. (R. 25.) There is seven or eight feet clearance when both tracks are occupied by trains. (R. 50.) If petitioner had dismounted on this bridge by getting off on the north side of the caboose he would have been entirely safe and could have crossed the bridge on the way to the place where he would make the emergency adjustment.

(5) *The evidence without contradiction negatives Pauly's contention that he had to dismount on the south side because he saw fire from the south side; demonstrates that he could have made his examination for the sticking brake from the north side of the train; and establishes that he should have used the bridge on the north side of his caboose to dismount and cross the creek.*

Petitioner on page 6 states that the fire caused by the sticking brake was seen on the south side, and for that reason he alighted from that side to fulfill his duty of inspecting and repairing the brake. This is not true. But the only reason the fire was seen from the south side is because the train was on a curve to the left which made the south side visible and the north side invisible (R. 85-87). It is uncontradicted that when one brake on a truck sticks and causes fire, all of them do and that the fire is thrown on both sides of the car. (R. 49.) The evidence shows without conflict that the identity of the sticking brake could be and actually was discovered and the brake fixed from the north side of the train after it stopped.

Ventura, testified that after the train stopped he actually found the sticking brake by looking for it on the north side of the train in spite of the fact that the fire had been seen flying from the south side (R. 46, 58, 59, 60); that they could tell from what they saw in the caboose that the fire was from a sticking brake (R. 47); that the fire was as bright as a yellow fusee (R. 48) and that it could be seen fifty cars away (R. 48); that when one brake sticks, all of them do (R. 49); that when the train is stopped the truck on which there is a sticking brake can be detected from either side of the car (R. 49). On redirect examination counsel for plaintiff attempted to put words into the mouth of Ventura, his own witness, that there would be no smoke coming from the north side wheels.

Ventura, however, testified positively that he discovered the sticking brakes from smoke coming from wheels on the north side (the platform side) of the train. (R. 60.) At R. 60 he testified:

> Q. The observation you made was with reference to smoke and odor, and that is all?
>
> A. Yes sir.
>
> Q. You don't know where it came from, do you?
>
> A. I know where the smoke come from, it was coming from the north side wheels.
>
> Q. How do you know?
>
> A. I seen them.

Ventura also testified without contradiction that no danger would be encountered in walking between the tracks to look for the sticking brake. (R. 50.) Pauly was the only other witness who testified on the subject and he also stated that when one brake is sticking all four are sticking because they are all controlled by the same brake cylinder, and that when one brake and wheel are hot and smoking, the others are also. (R. 148-150.)

(6) *The record establishes as matter of law that there was no passing train on the passing track when Pauly dismounted from the caboose.*

On pages 5, 6 and 44 and throughout the brief petitioner contends that one of the reasons he descended from the south side was because passenger train No. 20 was then passing on the north side. He pleaded it as his *only* excuse for getting off on the south side. (R. 3.)

This contention was completely rejected by the Supreme Court of Utah in the last paragraph commencing on R. 183 and ending on R. 184. It concluded that even giving Pauly the benefit of his "reconstructed testimony" Train No. 20 would have passed before Pauly stepped down. This is unquestionably true. Train No. 20 consisted only of an engine, baggage car, mail car, coach and sleeper—an engine and four cars. (R. 54.) It was going east and passed Ventura when

he was walking back to flag. (R. 38.) Even if Pauly checked only the engine of No. 20 on the west end of the caboose, that short train would have passed him before he could light his fusee and dismount. But Pauly testified that he performed his duty of checking all the equipment in Train No. 20, as required by Rule 810. (R. 116, 117.) All of Train No. 20 would therefore necessarily have passed him before he even commenced to dismount. After that train passed no other train passed during the 40 to 45 minutes until the ambulance came for Pauly. (R. 41.)

But Pauly definitely and positively testified that he was on the back platform of his caboose as Train No. 20 passed him; that while on the back platform he observed and checked the equipment in Train No. 20; and that after Train No. 20 had pased him and he had checked the equipment he went back into the caboose, put on his overcoat, went to the front platform with his lantern lighted, lighted the fusee and then stepped off the south side of the caboose step. His testimony is as follows:

> Q. At that time you were on the head end of the caboose, is that right?
>
> A. *When I checked the train I was on the rear end.*
>
> Q. When you checked the train you were on the rear end?
>
> A. That's right. When I said to the brakeman "I will go over and check that car while we are meeting another train." Evidently I knew they had our signal they were going to stop there.
>
> Q. You were on the rear platform?
>
> A. Yes; I told him to take care of the hind end; I went inside and put on my overcoat.
>
> Q. That all happened after you checked the train?
>
> A. That is, my going through the caboose to get my coat, yes.
>
> Q. Putting on your overcoat?
>
> A. Yes, I had no reason to have it on—still in the cupola; as I started to get down with it this train came

through the passing track, so I stepped to the rear platform to check it and told my rear brakeman to take care of the hind end, "I will check this car now."

Q. When you say it was engine 802 did you then know it was train No. 20?

A. Yes.

Q. Why?

A. *I checked the passenger equipment too; that is the usual passenger engine.*

Q. *Did you check the passenger equipment?*

A. *That's right.*

Q. *As it went by you?*

A. *Yes, that's right.*

Q. *When you were on the back platform?*

A. *Yes.*

Q. *What did the equipment consist of?*

A. *Baggage car, mail car, day coach and sleeper; four cars.*

Q. *Then after the train passed you going east you went back in the caboose and put on your overcoat and then went to the head end of the caboose, is that correct?*

A. *That is correct.*

Q. Was there any other equipment in the passing track after train 20 passed you?

A. No, not right exactly then, no.

Q. Was there at any time that you saw?

A. No. (R. 163-164.)

At the trial petitioner's counsel, by shockingly suggestive questions, brought out that Pauly had "reconstructed" his evidence on this subject. (R. 138.)

However, Pauly on cross examination affirmed the truth of the evidence given on his deposition: that he checked east bound

train No. 20 from the rear end of the caboose (R. 123); that he checked the equipment of train No. 20 as it went by him (R. 126); that train No. 20 was checked by him to consist of four cars, baggage, mail, day coach and sleeper (R. 127); that after he checked train No. 20 from the back platform he went into the caboose and got his coat (R. 126); and that he saw no other equipment on the passing track at that time. (R. 128.)

Here again, respondents invoke the principles of law demonstrated *supra* in Section (1) that a party cannot create questions of fact for the jury by testifying both ways; that a court regards as true that portion of a *party's* evidence which bears most strongly against such party; and that a party is not permitted to testify both ways.

(7) *There is no evidence that any Safety Rule or custom required petitioner to dismount from the south side of the caboose.*

On pages 6, 37 and 44 and throughout his brief petitioner asserts that Ventura and Pauly dismounted on the south side "in compliance with the Railroad safety rules," reference being made to R. 38, 39, 90. Venture merely testified as follows:

> Q. The south side. Have you had, as brakeman, any instructions with reference to the side from which to dismount?
>
> A. Yes sir, its the best to mount on which side is the safest.
>
> Q. Which would be the safest side?
>
> A. The left side.
>
> Q. Why?
>
> A. Because there was a train coming down the pass, might fall, and fall right into the wheels of the train.
>
> Q. And so you dismounted, as you say, from the left side?
>
> A. Yes sir.

Ventura made no mention of any Safety Rule which required him to dismount from the South side.

On page 44 also it is stated that the petitioner prepared to alight from the train on the south side because the Safety Rules required it and reference is made to page 90 of the record. The only evidence by the petitioner on the subject of rules is as follows:

> Q. During the years that you have worked for the defendant here as brakeman and as conductor, have you ever had, or received any instructions with reference to the proper side of the train from which to alight under different circumstances?
>
> A. Well, safe course is the course to pursue; one of the rules of the company, always pursue the safe course.
>
> Q. Under that rule which would be the safe side to alight from, if the train were stopped on the main line track at Chacra?
>
> Q. At night.
>
> A. Left side of the train.

Thus Pauly himself negatived the existence of any Safety Rule specifically providing that trainmen must dismount on the side away from a passing track and relied solely on the general rule to always "pursue the safe course." Pauly's conception of "the safe course" in the case at bar was to step off without looking at a place where he knew there was no platform, although he knew that on the other side of the train there was a platform.

There is no other evidence on the subject.

Merely because Ventura dismounted from the south side in no way justifies petitioner's argument that Pauly was justified in doing so. When Ventura stepped down the train was still moving and he had not reached the bridge (R. 38). When Ventura stepped down, a train was passing on the passing track (R. 38). When Pauly stepped down there was no train on the passing track (supra Section (6)). But, above all,

Ventura used his lantern to observe whether there was a safe footing and determined that he was stepping on to solid ground before he stepped down (R. 52).

(8) *There is no evidence that trains customarily stopped or were inspected or repaired at Chacra. The only evidence is that Chacra was a passing track where trains pass and where emergency work might be done.*

Plaintiff alleged that freight trains "were customarily and ordinarily stopped upon defendants' main line and passing tracks" and that it was "usual, customary and necessary for members of various train crews to pass along said trains" for the purpose of examining trains. (R. 4.)

Petitioner on pages 4, 5, 9, 10, 18, 19, 20, 23 assumes that these allegations were proved and makes the most exaggerated statements such as that the Chacra siding, including the south side of the bridge, is "continually and customarily used by defendants' employees" (page 19) and that petitioner worked on the south side of the bridge "when he was injured in the *usual* course of his employment." On page 18 of his brief he says:

> In the usual course of his employment it was necessary for petitioner to work at the time and place where he was injured. The place was within and a part of an area where the work of dismounting from trains, train inspection and repair was customarily performed.

And on page 9 of his brief petitioner says:

> The bridge at Chacra was located within the switch limits of a passing track used by respondents *at all hours of the day and night and in all kinds of weather for the purpose of stopping, inspecting and repairing trains as well as for the purpose of permitting trains to pass.*

These same ridiculously exaggerated contentions were made before the court below. The Supreme Court of Utah carefully scrutinized the record, was unable to find any such evidence and so declared. (R. 173-175, 178). It summed up the evi-

dence and record as demonstrating, without conflict, that Chacra was nothing but a passing track. At R. 178 the court said:

> * * * The only justifiable inference from all the testimony is that where there is trouble which materially interferes with movement, the train must stop and adjustments or repairs be then made unless the train can make it to an available and adequate passing track which in this particular case happened to be Chacra.

There is no evidence whatever in the record that petitioner, or any other railroad employee, has ever had any work to do on the south side of the bridge or any occasion to try to walk along it. In fact, it is impossible to walk along it when it is occupied by a train (R. 28, 30, 206).

The entire evidence on the subject of the use of the passing track at Chacra is as follows:

Pauly at R. 88, 89 testified as follows:

> Q. When a train is stopped on such a signal as was exhibited under your direction from the cupola of your caboose because of a sticking brake, what are the duties of the conductor, and what are the duties of the rear-end brakeman, and what are the duties of the head-end brakeman?
>
> A. Well, start from the head-end, the head-end brakeman should be looking back for—
>
> Q. I mean after the train stops, Mr. Pauly, the train has been stopped, now, in response to the signal?
>
> A. I see.
>
> Q. When it is stopped, what are the duties of the head and rear brakemen, the rear—
>
> A. After the train is stopped, the head-end brakeman will start from head-end toward the rear end; in that instance, the rear brakeman or flagman, shall pick up a particular signal, whether daylight signals,—take daylight signals—if night signals, go back immediately

to protect the rear of the train, and the conductor will go over the train to meet head-end brakeman, or, if he gets to the trouble first, then rectify it, then give a signal to head-end he has fixed it, then proceed.

Q. In other words, the conductor starts toward the scene of the trouble one way, and the head-end brakeman the other?

A. Yes, sir.

Q. Now, as I understand it, when this train finally —when the rear end of this train finally cleared the east switch point at Chacra, the train began to stop?

A. Yes, sir.

Q. And what, under those circumstances what did your duties require you to do?

A. Immediately go over and ascertain the cause of trouble on my train.

Q. And where did you have in mind that this trouble was?

A. On the left-hand side of the train where I saw the fire.

Q. Ten or fifteen car lengths?

A. Yes, sir.

Q. Before the train came to a stop you may tell the jury what you did before it came to a stop; well, as the train was coming to a stop, Mr. Pauly, was slowing down and coming to a stop, what did you do?

A. Well, as near as I remember, I picked up my light, yellow fusee, and my coat, put them on, and told my rear-end brakeman to go back and protect the rear end of the train, and I would go over and check that car.

Ventura testified at R. 43, 44 as follows:

Q. To the east and the west. Mr. Ventura, during the time you have worked for the Rio Grande, you may

state whether or not it's common practice for trains to stop and trains to pass one another at Chacra?

A. Yes, sir.

Q. And has that passing track been in constant use for that purpose during all the time you have worked there?

A. Yes, sir.

Q. Mr. Ventura, under what circumstances are trains stopped at Chacra?

A. What are they stopped for?

Q. Yes.

A. Well, if another train was coming to the passing track, they will make you wait there until he gets in the clear, then let you go; if there is trouble with the train there, they see a red fusee back there, they should stop.

Q. Stop on passing track in order to make an investigation?

(Note the leading of Petitioner's own witness.)

A. Yes, sir.

Q. How is the traffic, the train traffic handled on the road there between Glenwood Springs and Grand Junction?

A. C.T.C., centralized traffic control.

Q. All right, tell the jury what centralized traffic control is?

A. Centralized traffic control, it is man—one man operates the whole, the switches and turn-outs, he lets you in the passing track and lets you out the passing track with your train. You don't have to throw the switches, it is automatic. He has got a board up there and he can follow the train by little spots on this board, and he can let you in and out the passing track himself. You don't have to get off the engine, turn the switch.

Q. And, Mr. Ventura, when a train comes up against the signal there at the west switch point at Chacra, and it is clear, why then, of course, you can move right on, pass the switch point and continue on the main line?

A. Yes, sir.

The only scintilla of evidence that investigations were made is the leading question by counsel of his own witness: "Q. Stop on passing track in order to make an investigation? A. Yes, sir."

Linkins at R. 68, 69 testified as follows:

Q. Mr. Linkins, during the years that you have been employed as an engineer and fireman by the Rio Grande, you may state, in a general way, the usage made of this passing track at Chacra?

A. Well, all it's for is just when they got one train going east and west, they have to get them by one another, why, they put one on the passing track, and the other holds the main line and they pass.

Q. What about occasions where something happens to the train, makes stopping necessary?

A. Well, since they installed this C.T.C., when we get something like that, and have to stop, it is customary to try to stop between the switches, so as not to tie the railroad up, and if there is any other trains going in either direction, they can come, in case you are in trouble, then not going to be able to move.

Q. When you are in trouble and the train moves in to Chacra, what does the train crew usually do?

A. Well, they—after the train, you mean after they have stopped or before they have stopped?

Q. Yes, after they have stopped?

A. Well, they get off and try to ascertain what the trouble is.

Q. When you say "they," you refer to the rear end crew?

A. Well, the rear end crew and the head brakeman, he gets off and starts back, and the conductor, he comes forward until he meets the head man, and, of course, the hind man, he has got to go back and flag; that is his duties.

Q. In other words, the rear end brakeman goes back to flag, the conductor comes forward to ascertain what the trouble is?

A. Yes.

Q. The head end brakeman goes back towards the scene of the trouble?

A. Yes.

The pictures at R. 206-208, 217 show the nature of the country at Chacra. It is open, mountainous and unsettled country. There is nothing but a passing track and a bridge. The record does not justify and is contrary to plaintiff's exaggerated statements regarding the use of these tracks.

(9 *There is no evidence of any custom or practice for disabled trains to go to Chacra or that the train in question proceeded any distance to Chacra or that any one except the engineer decided to stop at Chacra.*

On pages 4 and 5 petitioner states that there is such a custom and practice and at page 5 petitioner states that he made the decision to go on to Chacra and that the train went four or five miles to get to Chacra. At page 8 petitioner states that the evidence demonstrated that the crippled train was moved several miles. This is gross exaggeration. The only thing petitioner did was to show a red signal, which meant to stop (R. 76). *At the time when this signal came to the attention of the engineer he was at the east switch of the Chacra siding* (R. 76). He pulled the train far enough to clear the east switch and stopped about 700 feet short of the west switch. (R. 70.) Far from there being any custom and practice for a disabled train to proceed to a particular siding, it is, of course, always a matter for the exercise of judgment as to whether the trouble is such that it must be repaired at the

earliest possible moment or whether the train can safely proceed to a siding. Of course, if the train can safely proceed to a siding, that is the preferable course because it does not tie up the single track main line. Merely because this particular train was stopped for repairs on this occasion does not establish a custom or practice to stop at Chacra for repairs and there is no other evidence to that effect.

(10) *There is no evidence that the conductor and trainman were required in the exercise of their duties to walk along the south side of a train over the bridge.*

On pages 9 and 10 petitioner's brief states that the work of inspection and repair necessarily requires the conductor and brakeman to dismount and proceed over the bridge along the south side of trains standing over the bridge. There is no such evidence. On the contrary the evidence shows that when a train was standing over the bridge it was impossible for a person to walk along the south side of the train over the bridge. (R. 24, Exhibit E, R. 207, admitted in evidence R. 28.) How could a reasonable trainman think that it was necessary or proper to scramble along a stringer and ties on the south side of the bridge when he knew that there was a safe platform on the north side.

(11) *There is no evidence that any of respondents' bridges, situated as was the bridge at Chacra, was provided with walks and railings.*

On page 7 it is asserted that all bridges on Respondents' railroad on the same division as Chacra, except the one at Chacra involved in this accident, within switch limits were equipped with foot walks and hand rails. On page 35 it is asserted that the railroad itself established the standard for construction and maintenance of bridges located as was the bridge at Chacra and that they departed from this standard of care by failing to equip the Chacra bridge with a walk and railing and it is further asserted that the evidence was uncontradicted that all bridges within such limits, except Chacra, were equipped with footwalks and hand rails.

This contention was made before the Supreme Court of Utah, which reviewed the evidence, and summed it up in its opinion as follows:

> In the case at bar it appears that bridges on the line between Grand Junction and Mintern which are within 300 or 400 feet from switches have walkways for trainmen who leave the train to throw switches. (R. 180.)

There is no evidence that there was any custom or practice, either on the Denver and Rio Grande Railroad or any other railroad, that there should be a footwalk or handrail at a place such as the bridge at Chacra. Nor is there any evidence that where there is a footwalk between the main line and passing track, as at Chacra, there should also be footwalks and handrails outside of the tracks.

Only Pauly and Linkins testified on these subjects. Pauly described ten bridges (R. 140-142), which were equipped with footwalks and handrails. The bridge at Rifle he described as having a footwalk and handrail on only one side. (R. 141.) On cross-examination he admitted that he had not counted any bridges other than those with foot-walks and hand-rails. (R. 145.) He didn't deny that there were 67 bridges altogether between Minturn and Grand Junction (R. 145), a fact which was assumed to be true by counsel for all parties. (R. 145, 151.) He testified only as to 10 out of 67 bridges on the part of the railroad on which he worked. As to the ten with foot-walks and hand-rails, he testified that they were at or within 300 or 400 feet of switch points of passing tracks (R. 145); and that the purpose therefor at those points is to provide a thoroughfare for head brakemen who have to run ahead to throw switches. (R. 145-146.)

There is an obvious difference between the bridge at Chacra and those described by Pauly. Where there is a bridge within 300 or 400 feet of a switch there must be a foot-walk for the head brakeman to run along to throw the switch. Otherwise he would have to climb over the engine. That is what Pauly said in his evidence at R. 145, 146. The bridge at Chacra was not in such a position. It was 2000 feet from

the east switch and 4600 feet from the west switch. (R. 114, 115.) But even if it had been within 300 or 400 feet of a switch, the head brakeman could have crossed over the foot-walk between the tracks.

Linkins' evidence was merely that the majority of the sixty-seven bridges between Grand Junction and Minturn and Bond were between stations but not between or right at switches. (R. 151.)

All of the evidence on the subject of what bridges on the division in question are equipped with walks and rails is as follows:

Pauly's direct examination on this subject follows in full: (R. 140-142.)

> Q. Now, Mr. Pauly, I want to ask you to state whether or not you are familiar with and acquainted with bridges over creeks or canyons in the various yards of the defendant, and between various switch points in the divisions on which you were employed?
>
> A. I am.
>
> Q. And have you, during the 17 years that you worked for the railroad company examined and noticed those bridges?
>
> A. Yes, sir.
>
> Q. You may state whether or not the bridges that you have mentioned—that is, bridges across creeks or gullies between switch points and other switch and passing tracks are equipped with a foot walk and hand rail?
>
> A. They are.
>
> Q. And are they painted?
>
> A. They are painted white.
>
> Q. Do you have a list there in your pocket of similar—of bridges that are over creeks and gullies between switch points?
>
> A. Yes, sir.
>
> Q. All right, let's tell the jury about it.
>
> (Witness takes a paper out of his pocket.)

A. That is going east out of Grand Junction at Cameo, there is a bridge there entering switch points, has—

Q. Is that bridge between the switch points or—

A. Right at the—entering switch points, "switch points" as we call them.

THE COURT: How do you spell that?

A. C-a-m-e-o.

Q. Describe the bridge and the walk and the hand-rail.

A. Well, it's the length of it, you mean?

Q. Well, just go ahead and describe it.

A. Bridge about the length of the jury box, and, oh, I imagine it was about ten, fifteen feet deep, has hand rails and a foot walk on both sides of the bridge. Tunnel has a small bridge in the middle of it, extends through the passing track and the main line, and it has a hand-rail and foot-walk. Egan has a bridge at east end on the—leaving the switch points; that is a rather long bridge, not very high; it has a foot-walk and guard rail. And Beck has a very high bridge. It's in the middle of the—well, you know how the tracks extend. It is betwen the main line, it runs underneath both tracks, way I should state it, it has guard rails and hand-rails on both sides and it is painted white. Grand Valley has a small bridge, not very deep, and has a hand-rail, foot path, and it is also painted white. Of course, Chacra—let's see, Rifle has a bridge and it extends through both passing track and middle track on main line, and it has a hand rail and foot walk on the left-hand side, not on the right, just on the one side, on the main line side. Chacra—

Q. There is no bridge there.

A. No bridge.

Q. Or no foot walk?

A. No foot walk on either side or hand-railing. Funston is a big high bridge; it has a foot walk, it isn't

painted yet, and it has a guard rail on the east end of it and a foot walk across, all the way.

Q. And Funston is six miles to the—

A. East.

Q. East of Chacra?

A. And Dotsero has a bridge going towards the cut-off, and it was on the Y there, main line, as they call it, cut-off; it has foot walks on either side—guard rails, and footwalks, and it is also painted white. Going towards Minturn, there is one high bridge there—there are two high bridges there, one on the east switch point and one on the west switch point, both are equipped with hand-rails and foot-walks, both are painted white.

Q. You have now completed your statement in response to my question?

A. Yes, sir.

Pauly's cross examination on this point follows in full (R. 145, 146):

Q. Have you ever counted the number of bridges between Grand Junction and Minturn?

A. No, can't say that I ever counted them.

Q. Would you say there is about 67 of them?

A. I don't know about the number.

Q. And that there are only 16 of those 67 that have walks and hand-rails?

A. Well, I don't know; I haven't gone over them in my mind.

Q. You just counted those that you found with walks and hand-rails?

A. Yes, sir.

Q. That one in Cameo was within 400 feet of switch points, wasn't it?

A. It is right on the entering switch—switch points, yes.

Q. It is within 400 feet of switch points, is it not?

A. Oh, yes.

Q. And several others of these hand-rails and foot-walks that you mentioned were within three or four hundred feet of switch points, were they not?

A. Well, right on the switch points, there wasn't —I wouldn't say three or four hundred feet.

Q. Well, they were within that, I mean.

A. Yes.

THE COURT: Either on or within four hundred feet.

Q. Yes, that is what I mean.

A. All right.

Q. Now, it frequently happens, does it not, in operating trains that a train will come to a stop and the head brakeman has to make a run to a switch to throw a switch?

A. Yes, sir.

Q. Now, those bridges and hand-rails that are either at the switch or within three or four hundred feet are placed there for the purpose of giving a thoroughfare to that head brakeman, isn't that right?

A. Just a moment, right now, just put—

THE COURT: Do you want to have that question re-read to you- You said, "Just a minute," like you didn't understand or something.

A. At these particular places, yes, that's correct.

The evidence of Linkins on this subject follows in full (R. 151):

Q. Mr. Linkins, there was suggested yesterday, in one of the questions Mr. Van Cott addressed to Mr. Pauly, to the effect that on this division that you are working on—that is, division between Grand Junction and Bond and Grand Junction and Minturn, there is sixty-seven bridges over tracks and gullies, and the like, that pass under the track; you may state whether or

not these sixty-seven bridges are in switch limits, or are the majority of them on the main line track beyond switch limits?

A. Well, I'd—I never counted the bridges, or—but I would say that the majority of them is between switches that—between the different stations, the majority of them bridges; of course, there is bridges in a good many places that's between the switches and right at the switches, and—

(12) *The jury returned a general verdict but made no special findings.*

Petitioner's brief would create the impression that the jury made special findings and arguments are made based upon such an assumption. Thus, on page 10, petitioner states that the jury found that he was injured because of the unsafe condition of the bridge. Again on page 10 he states that the jury found causal relationship between the failure to equip the bridge for foreseeable use. On page 14 he states that the jury selected and acted upon the reasonable inference that the passing tracks and adjacent territory at Chacra were used for the inspection and repair of trains and to that extent was a work place. On page 31 petitioner states that the jury found that the whole of the territory at Chacra was a place of work. On page 32 he states that the jury found that the railroad could reasonably foresee that trainmen intent upon the discharge of duty would alight from the south side of trains standing upon the bridge. On page 36 he states that the jury found that the bridge was a place of work. On page 38 he states that the jury found that the railroad should reasonably have foreseen the likelihood of injury to employees because of the condition of the bridge.

The only justification for these statements is a general verdict (R. 19) which necessarily implies only that the jury found that the railroad was guilty of some negligence and that Pauly was guilty of some contributory negligence. The general verdict does not justify the contentions made by petitioner that the jury made any particular findings of fact.

SUMMARY OF ARGUMENT

I

The Supreme Court of Utah Properly Set Aside the Jury's Verdict and Dismissed the Petitioner's Case because the Verdict of the Jury was not supported by Substantial Evidence.

According to the recent decisions of this court under the Federal Employers Liability Act there must be evidence of negligence on the part of defendants and such negligence must be a proximate cause of the accident. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should direct a verdict in favor of the defendant. In the application of this rule it is not sufficient that there be merely a scintilla of evidence. There must be substantial evidence. The mere possibility that an accident may result from a given condition is not sufficient to constitute negligence. An accident and injury are always possible. Merely because an accident occurs and an injury is suffered is no evidence of negligence. Inasmuch as there was no substantial evidence of negligence on the part of the railroad which proximately contributed as a cause of this accident, the Supreme Court of Utah properly decided that the trial court should have directed a verdict for the defendants.

II

The Supreme Court of Utah properly held that there was no Evidence of Negligence by the Railroad in failing to exercise reasonable care in furnishing Petitioner with a safe place of work.

The only allegation of negligence in this case is that the defendants failed to furnish plaintiff a safe place of work in that it did not maintain a walkway with handrails on the south side of the bridge at Chacra and that it also failed to provide lights or markers to indicate the presence or dimen-

sions of said bridge. There is no evidence that the absence of lights and markers on the bridge constituted negligence. Also there is no evidence that the absence of footwalk and handrail on the bridge constituted negligence.

Under the uncontradicted evidence the place where Pauly stepped down on the south side of the bridge at Chacra cannot be regarded as a place of work as to Pauly under the facts and circumstances involved. The emergency work which he had to do was some 500 to 750 feet west of the bridge. There was a perfectly safe way for Pauly to get to the place where the sticking brake had to be fixed by descending on the platform on the north side of his train. Pauly knew that there was a platform on the north side and none on the south side. He had thought about this only a few seconds before the train came to a stop and guessed that the caboose had passed over the bridge. Acting upon that guess, with adequate means to see, he stepped down from the caboose without looking.

If a railroad must take means to prevent a trainman from falling, as Pauly did, it would have to provide something in the nature of life nets along its entire road because trains at times may stop any place on a railroad because of trouble. Chacra was nothing but a siding to which trains might proceed in case of trouble, if not too far away and if the trouble permitted.

Cases involving falls from bridges decided by the Supreme Court of the United States, Circuit Courts of Appeal and State Courts demonstrate that this case should not have been submitted to the jury. Petitioner has failed to distinguish these cases.

None of the cases cited by petitioner supports his contention that the railroad was guilty of negligence in failing to equip the south side of the bridge, as well as the north side, with a walk and railing. As a matter of fact, there is no evidence that Pauly would not have been injured in dismounting as he did even if there had been a walk and railing. So far as is made to appear, such a railing might have tripped him and caused him to fall headlong instead of feet first, in which case he might have been more seriously injured or killed. A walk

and rail are designed to walk upon, not as a life net to catch experienced conductors.

III

The Supreme Court of Utah correctly held that there was no reason why the Railroad, in the exercise of reasonable care, should have anticipated that an experienced conductor would step off a caboose without looking and provide facilities to catch him.

As matter of law the railroad should not have been required, in the exercise of reasonable care, to anticipate that an experienced conductor, such as Pauly, with full knowledge of the existence of a safe platform on one side of the train and with full knowledge that he was in the immediate vicinity of the bridge, would step therefrom without looking, in violation of rules and regulations, although equipped with adequate means to see precisely where he was.

IV

The Supreme Court of Utah correctly held that a verdict should have been directed because the sole cause of the accident was Pauly's own negligence.

The Supreme Court of Utah held that Pauly's own negligence was the sole cause of the accident because it was the only negligence involved, whether proximate or remote. This was correct because there was no evidence that the defendants were negligent in failing to have a walk and railing on the south side of the bridge and also because a jury should not be permitted to find that the railroad, in the exercise of reasonable care, should have anticipated that Pauly would act as he did.

The decision of the Supreme Court can also be supported because Pauly's negligence was the sole proximate cause and

made remote the negligence of the railroad, if any. Without question, if Pauly had actually known that he was stepping into space, his voluntary act would be the sole proximate cause. The situation was the substantial equivalent of actual knowledge because Pauly knew of the fact that there was a safe place on the north side and that there was no place to dismount on the south side. He had thought about it only a few seconds before, guessed that he had passed the bridge and acted upon that guess by stepping down without looking. Accordingly under the doctrine announced by this court in a recent case, no negligence on the part of the railroad was a link in an unbroken chain of reasonably foreseeable events.

ARGUMENT

I

The Supreme Court of Utah Properly Set Aside the Jury's Verdict and Dismissed the Petitioner's Case because the Verdict of the Jury was not supported by Substantial Evidence.

Herein of Petitioner's Point I.

Under the F. E. L. A. there must be evidence of negligence on the part of the defendants and such negligence must be a proximate cause of the accident.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232. Decided Dec. 20, 1943. This case arose under the F. E. L. A. The decedent was killed by a car, on which he was riding, running over a derail switch. There was a failure of evidence as to what person set the derail which caused the accident, whether Brady or some other person. The court held that verdict was properly directed for the defendant. On pages 479 and 480 the court said:

> * * * *When the evidence is such that without weighing the credibliity of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit,*

directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. *By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.*

On page 480:

• • • Our conclusion is that there is failure to show in the record any negligence of the carrier from not putting a light on the derailer or by the action of other employees than decedent in closing the derailer.

On page 483:

• • • *The rule as to when a directed verdict is proper, heretofore referred to, is applicable to questions of proximate cause.*

On page 484:

• • • *Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury.*

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, 88 L. Ed. 322, 64 S. Ct. 409. Jan. 17, 1944. On page 32 the court said:

In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 63 S. Ct. 444, 451, 143 A. L. R. 967. *Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."*

Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, 86 L. Ed. 446, 63 S. Ct. 444. On page 67 the court said:

> They leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the accident.

The recent case of *Lavender* v. *Kurn*, decided by this court and quoted from on page 13 of Petitioner's brief does not change this rule. On the contrary, on page 744 the court says: "Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear." That is precisely the situation in the case at bar, where Pauly by his own affirmative evidence shows that there is a complete absence of probative facts to support the verdict.

DeZon v. *American President Lines, Ltd.*, 318 U. S. 660, 87 L. Ed. 1065, 63 S. Ct. 814. This was an action brought under the Jones Act, 46 U. S. C. A., Sec. 688, granting the same cause of action to seamen as those granted to railroad employees by the Federal Employers Liability Act.

Under the F. E. L. A. there must be more than a scintilla of evidence. Unless there is more than a scintilla of evidence the case may not be submitted to the jury.

Brady v. *Southern Ry. Co., supra.* Dec. 20, 1943. On page 479 the court said:

> * * * *The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury.*

The mere possibility that an accident may result from a given condition is not sufficient to constitute negligence.

Brady v. *Southern Ry. Co., Supra.*

This Court held that although it was a bare possibility that striking a derailer from an unexpected direction would

cause an accident that it was so unusual that provision to guard against it was beyond the requirements of due care. On page 483 the court said:

> The Supreme Court of North Carolina (222 N. C. at page 370, 23 S. E. 2d at page 338) was of the view that striking a derailer from the unexpected direction "was so unusual, so contrary to the purpose" of the derailer that provision to guard against such a happening was beyond the requirement of due care. *With this we agree. Bare possibility is not sufficient.*

An accident and injury are always possible. Merely because an accident occurs and an injury is suffered is no evidence of negligence.

Accordingly, inasmuch as there was no substantial evidence on the part of the Railroad which proximately contributed as a cause of the accident, and the sole proximate cause of the accident was the negligence of Pauly, the Court properly decided that a verdict should have been directed.

II

The Supreme Court of Utah properly held that there was no Evidence of Negligence by the Railroad in failing to exercise reasonable care in furnishing Petitioner with a safe place of work.

Herein of Petitioner's Point II.

The only allegation by petitioner that defendants failed to exercise due care to furnish him a safe place to work is in subparagraph B of paragraph 9. (R. 4.) It charges that the Railroad failed "to build, construct and maintain a walk with handrails on the side of the bridge" and failed to provide any lights or markers to indicate the presence or dimensions of said bridge and failed by any means to protect employees against the dangers of the bridge. (R. 4.) Subparagraph A of paragraph 9 of the complaint, which is referred to by the Supreme Court of Utah at R. 172, was in fact stricken from

the complaint by the District Court on motion of Respondents and does not appear in the printed record, (R. 4) nor in the original record (Fol. 4).

There is no evidence that the absence of foot walk and hand rail on the south side of the bridge constituted negligence.

There is no evidence that there was any custom or practice, either on the Denver and Rio Grande Railroad or any other railroad, that there should be a footwalk or handrail at a place such as the bridge at Chacra. Nor is there any evidence that, where there is a footwalk between the main line and passing track, as at Chacra, there should also be footwalks and handrails outside of the tracks.

Only Pauly and Linkins testified on the subject. Pauly's entire evidence on the subject is to be found at R. 140-142 on direct and at R. 145, 146 on cross-examination and is set forth in full in Section 11 of this brief under the heading "Omissions and Misstatements of Facts in Petitioner's Statements of Facts."

Pauly was asked on direct examination only as to bridges at sidings between switch points. (R. 140-142.) He described ten such bridges (R. 140-142), which were equipped with footwalks and handrails. The bridge at Rifle he described as having a footwalk and handrail on only one side. (R. 141.)

On cross-examination he admitted that he had not counted any bridges other than those with footwalks and handrails. (R. 145.) He didn't deny that there were 67 bridges altogether between Minturn and Grand Junction (R. 145), a fact which was assumed to be true by counsel for all parties. (R. 145, 151.) He testified only as to 10 out of 67 bridges on the part of the railroad on which he worked. As to the ten with footwalks and handrails, he testified that they were at or within 300 or 400 feet of switch points of passing tracks (R. 145); and that the purpose therefor at those points is to provide a thoroughfare for head brakemen who have to run ahead to throw switches. (R. 145, 146.)

Linkins' evidence was merely that the majority of the sixty-seven bridges between Grand Junction and Minturn and Bond were between stations but not between or right at switches. (R. 151.)

There is an obvious difference between the bridge at Chacra and those described by Pauly. Where there is a bridge within 300 or 400 feet of a switch, there must be a footwalk for the head brakeman to run along to throw the switch. Otherwise he would have to climb over the engine. That is what Pauly said in his evidence at R. 145, 146. The bridge at Chacra was not in such a position. It was 2000 feet from the east switch and 4600 feet from the west switch. (R. 23, 24.) Such was the conclusion of the Utah Supreme Court as to the evidence and facts. (R. 180.) But even if it had been within 300 or 400 feet of a switch, the head brakeman could cross over the footwalk between the tracks.

Under the uncontradicted evidence the place on the south side of the bridge at Chacra where Pauly stepped off cannot be regarded as a place where he had work to do.

Petitioner adopts as the major premise of his argument that every foot of ground at the Chacra siding, both between the tracks and on the sides, are places of work which must be kept safe as to all employees, at all times and under all circumstances and claims this is supported by the doctrine of the Supreme Court of the United States in the case of *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062. The difference between the two cases is obvious. Bailey's job was to release the dumping mechanism so that the material would fall from the car to the road below. In order to do that he could only take one position, to wit: at the side of the car and on the edge of the bridge. It was obviously a place of work selected for him by his superiors. Pauly on the other hand, had nothing to do on the bridge except to cross it and to proceed westerly ten to fifteen car lengths (500 to 750 feet), there to eliminate sticking brakes. Moreover, there was a perfectly safe way for Pauly to get to that place. He could dismount on the north side of his caboose on the platform.

Inasmuch as under the uncontradicted evidence there was no reason for Pauly to get down from the caboose on the south side and there was a safe platform on the north side, he was reduced to the necessity of claiming that every place in Chacra, including the place from which he fell, was such that there must be some provision made, so that he would be caught when he dismounted without looking. Petitioner makes that contention on pages 17 and 18 and claims that the evidence of Ventura, Linkins and Pauly supports it. He contends that all three of them testified that "this territory was a place of work." No reference to the record for such extraordinary evidence is given. None such was given. It would have been objectionable as a conclusion of law.

All of Ventura's evidence on this subject will be found at R. 43, 44; Linkins' at R. 68, 69; and Pauly's at R. 88, 89 and is set forth in this brief in section 8 under the heading "Omissions and Misstatements of Fact in Petitioner's Statements of Facts."

That evidence was carefully considered and analyzed by the Supreme Court of Utah at R. 174, 175, 177 and it is submitted that it is correctly summarized at R. 177 and 178 as follows:

> The engineer, Linkins, did not so testify. The inference from all the other testimony as to the use of the passing tracks was that they were for the purpose of passing and that, if there was trouble with the train, it endeavored to reach the nearest passing tracks in order not to block traffic; that this was incidental and a convenience and that they were not used generally for inspection and if used to inspect in case of trouble that such place was no more a place to work in the matter of inspection or repairs than was any other similar part of the railroad line.

To be sure, the south side of the bridge at Chacra might have become a place where work was to be done under certain circumstances. Suppose for example a car had to be dumped, as in the Bailey case, and the employee was directed by his superiors to stand on the south side of the bridge to manipulate

the dumping mechanism, he would have work to do at that place. Or suppose the fire on the trouble car was caused by a *hot box* on the south side (as Justice Turner erroneously assumed in the case at bar, R. 195) and that car stopped on the bridge and Pauly was directed by his superiors to fix the hot box while standing on the south side of the bridge, it would be a place where he had work to do.

But merely because a certain spot on a railroad is a place where work has to be done under certain facts and circumstances, it does not follow that work has to be done there under all facts and circumstances. Thus in the *Bailey* case, suppose there was no car on the bridge and the decedent, instead of standing on the edge of the bridge to manipulate the dumping mechanism was merely walking from one end of that bridge to the other to get to the place where he was to perform emergency work and, instead of using a perfectly safe platform walk between the rails was walking along that same stringer and fell therefrom. Obviously that stringer would not be a place where he had work to do under those circumstances.

It is uncontradicted that Pauly's only purpose was to proceed to the car with the sticking brakes and cut out the air brakes on that car. This could have become necessary any place on the railroad. It did not pertain particularly to a passing track. This train went as far as the side track at Chacra only because it was near at hand and because it could safely do so. (R. 70.) Otherwise it would have been stopped on the main line between stations. Pauly had no work to do on the bridge. (R. 88.) He would use the bridge only to cross the creek to the car with sticking brakes. To do this he had a perfectly safe walk way between the main line and passing tracks.

If the railroad was required to regard the south side of this bridge as a place of work which it must keep safe so that conductors could step off cabooses without looking, it would follow that every foot of ground, not only in the Chacra siding but over the entire railroad, would have to be kept in like condition. A brake may stick any place on the railroad. If it sticks and is sufficiently dangerous, the train must be

stopped out on the main line where there is no siding at all. It might be stopped on trestles, mountain sides, etc. (R. 133.) It merely happened that this sticking brake was seen at a time when the engine was right at the Chacra siding and under such circumstances that the engineer concluded they could safely go on to that siding. Pauly had to proceed from the place where the caboose stopped to the place where the brakes were sticking. For this purpose the Railroad had a duty to furnish a reasonably safe way to cross the creek. But that duty the Railroad fulfilled by building a safe platform between the main line and passing track.

A train can and does get into trouble away from sidings as well as at sidings. In fact it would usually be away from sidings. Of course, if a train is stopped by trouble out on the line, away from sidings trainmen must move along the train and look where they are going to prevent falling. Pauly admitted on cross-examination that there are many, many places on a railroad where trainmen must look before alighting. At R. 133 he testified:

> Q. Now, there are many, many places on a railroad where if you didn't look for a safe footing before you alighted from equipment, you would be seriously injured, aren't there?
>
> A. Yes.
>
> Q. For example, between stations, there are many places between Dotsero and Chacra in Glenwood Canyon, for example, where if you didn't look you would go clear down the side of the canyon, isn't that true?
>
> A. Yes, sir.
>
> Q. Haven't you made a practice of—through your railroad experience, to look before you stepped down from equipment?
>
> A. Yes, sir.

Obviously the place where Pauly stepped off was not intended as a place of work because there was nothing to stand or walk on. Between the tracks there was a wooden platform. That was the place to walk. There was no more reason to

have a footwalk on the south side of the Chacra bridge for Pauly to alight on than on any bridge on the main line. Petitioner has not had the temerity to contend that railroads must provide rails and walks at all places on their lines.

Cases involving falls from bridges decided by this and other Courts demonstrate that this case should not have been submitted to the jury.

A case from this Court is *Baltimore & O. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510. Decided 1932. Berry was an experienced rear brakeman injured when he attempted to alight in the night time from a caboose standing on a bridge which had no foot walk or guard rail and was so narrow as to afford no foothold, with all of which he was familiar. Berry and his conducor rode in the caboose. The caboose stood on the trestle. The conductor ordered plaintiff to go ahead and fix the hot box. Plaintiff took his lantern, walked down the caboose steps, stepped into space and fell in the ravine spanned by the trestle. This court declared that the sole cause of the accident was the negligence of plaintiff and that there was no evidence of negligence by the railroad. Mr. Justice Stone delivered the opinion. On pages 275 and 276 the court said:

> There was no breach of duty on the part of the conductor in asking the respondent, in the performance of his duty, to alight or in failing to inspect the place where he alighted or to warn him of the danger. *If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act.*

The Berry case was relied on in *Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 577, 92 N. H. 495. Kenney was killed while serving as head brakeman of a freight train, when he stepped from the side ladder of a box car which had been stopped on a bridge within station limits at Merrimack, N. H. There was no walk or guard rail. The train was proceeding south on the main line on a dark night. The crew had orders

to leave two cars and pick up one at Merrimack. Accordingly the train stopped just north of a block signal about 1400 feet north of the Merrimack station. 465 feet south of the block signal was a switch leading to a siding known as the McElwain Siding. 240 feet south of this switch was the north end of the bridge. 631 feet south of the bridge was the station and 535 feet south of the station was a switch leading to a siding called the Excelsior Siding. After the train stopped the crew proceeded with the work of cutting out the two cars to be left at Merrimack. This work was done under the direction of the deceased, it being his duty to throw the switches and attend to the coupling and uncoupling of the cars. He first uncoupled the head car and upon his signal the engine took it south sufficient to clear the switch and it was left on the side track. The engine went back and cut off another car which was drawn south over the bridge past the station and set upon the side track. The engine then picked up the car on the side track which was to be picked up and coupled to the cars that had been left standing north of the block signal. In taking this car back to the cars north of the block signal the engineer stopped the locomotive with the car on which the deceased was riding from eight to ten feet north of the south abutment of the bridge. The engineer testified that the deceased gave the signal to stop. After the stop the engineer saw the deceased with his lighted lantern climb down the side of the car and fall into the creek below.

The plaintiff contended that the Railroad was negligent in not providing the bridge, as a work place, with a cat walk and a rail. The trial court submitted this ground of negligence to the jury and the Supreme Court of New Hampshire held as matter of law that there was no duty on the part of the railroad to anticipate that Kenney would use the bridge as a work place. The court said on page 560:

> Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had

> occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe as a work-place being anticipation (cf. D'Ambrosio v. Boston & M. R. R., 81 N. H. 119, 124 A. 551) no duty in that respect can be found. *The bridge was not a workplace in the sense that might perhaps have been found if the shifting operations were likely* to result in a car standing on the bridge.

Commenting on the *Berry* case as compared with the *Kenney* case, the court said:

> On the facts, omitting speculation as we must, this appears to be even a weaker case than Baltimore & O. R. Co. v. Berry, 286 U. S. 272, 52 S. Ct. 510, 511, 76 L. Ed. 1098, where the conductor gave the brakeman orders to get off for a railroad purpose and the brakeman stepped into space.

Another case that followed the Berry case is *Yazoo & M. V. R. Co.* v. *Sudduth*, 171 Miss. 619, 157 So. 527 (1934). The decedent, Sudduth, was head brakeman. The main line track ran north and south through Harriston and the bridge was located about twenty car lengths south of the station. Two railroad lines crossed in Harriston and there was a good deal of switching and interchange of cars. On the east side of the bridge there was a walkway from one end to the other. On the west side there was no walkway and no way to alight from the west side of the train while it was standing on the bridge. Shortly after starting southerly from the station within Harriston the rear trainman discovered that the air in the brake system had been cut. The engineer was signalled to stop and did so. Sudduth was then in the cab of the engine and heard the engineer remark, "they have flagged me down." It was dark. The deceased thereupon took his lighted lantern, walked by the fireman toward the west side of the cab. He was not seen thereafter until he was found in the creek bed below the bridge. The court held that the Railroad Company was entitled to a directed verdict. Referring to the case of *Baltimore & Ohio R. R. Co.* v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, the court on page 529 said:

We are unable to distinguish any difference i principle between the present case and that case. In th present case both the engineer and Sudduth knew o the danger, while in that case neither the conducto nor the brakeman knew of the danger. In neither cas was there any fact or circumstance to put the superio employee on notice that his subordinate might be in jured in alighting from the train and therefore shoul be warned against the danger.

Another case following the Berry case is *Missouri Pacifi R. Co.* v. *Hathcock*, 200 Ark. 294, 139 S. W. (2d) 35, 1940 Hathcock, a brakeman, was injured when he fell from a trestle The train proceeding northerly stopped in the city of Newport Ark., about one hundred feet north of a trestle. The conducto directed plaintiff to get off the caboose where he was riding and back flag. It was dark and stormy. Plaintiff got out and in attempting to pass over the trestle fell into the creek bed below. The trestle had no lights or guard rails. He testified that he did not know where the trestle was and that he had been over it only a couple of times. The court held that the defendant was entitled to a directed verdict. It said on page 39

* * *

* * * Appellee's explanation is that he thought he was on a dump, and dumps are built so that one step ping off the railroad will not fall into space. But this assumption was appellee's error of judgment. *Ordin ary prudence suggests that one engaged at night or unfamiliar premises should use the means at hand for observing his course when departing from a zone of safety.*

* * *

Railroad companies are not as a matter of law re quired to maintain banisters on trestles. The fact that in some instances this extraordinary care is exercised does not establish by implication a custom upon which employees may rely to the extent that they are re lieved of the obligation due themselves to observe phys

ical conditions where the means of so doing are provided.

Another case following the Berry case is *Marinko* v. *Chicago, M., St. P. & P. Ry. Co.*, 63 S. D. 256, 257 N. W. 639 (1934). Marinko, a bridge carpenter, was riding in a bunk car to a point on the defendant railroad where he had been directed to repair a bridge. About three miles west of Selfridge the train stalled and it was decided to cut the train in half and take it to Selfridge in sections. After the train was cut in two and the first section moved, the bunk car in which the plaintiff was riding stood on a bridge. Plaintiff decided to get out and descended the ladder on the outside of the car and stepped into space. It was dark and stormy and there was no walkway or rail along the bridge. Marinko claimed that the defendant was nelgigent in failing to provide a reasonably safe place to work. The Supreme Court of South Dakota held that the trial court erred in refusing to grant a directed verdict.

In *Davis* v. *Shirer*, 288 Fed. 293, (4th C. C. A. 1923), the plaintiff was a flagman and was injured when he fell from a trestle. The space between the ties was covered with ballast exactly as it would have been if the trestle had been a solid embankment, except at the outer edge on each side there was placed a sill in the shape of a timber 10x14, the purpose of which was to hold the ballast in place. The ballast was about three feet in width outside the ties on each side of the rails. The ballast sloped downward toward the sill. Plaintiff's intestate was attempting to get on his train, which was moving over this trestle, and fell into the creek bottom below. There were no guard rails along the ends of the trestle. Plaintiff contended that the defendant was negligent in not providing guard rails on the ends of this trestle. The court held that there was no duty to make the trestle safe for its employees to get on or off the trains. In the opinion on page 296 it is said:

> No standard of reasonable care requires a railroad so to construct its trestles that they can under all conditions be safely used by pedestrians when a train is standing on them or moving over them.

Petitioner wholly fails to distinguish the Berry, Kenney, Sudduth, Hathcock, Marinko and Shirer cases.

On pages 25 and 26 petitioner argues that prior to 1939 there could be no recovery for negligence by an employer in failing to furnish an employee with a safe place of work. Such a statement is entirely inconsistent with the history of the law of Master and Servant. That basis of liability existed many years before the Federal Employers Liability Act came into existence. To be sure, assumption of risk was a defense to it in Federal Employers Liability Act cases prior to 1939. But petitioner's argument that prior to that amendment, "a case founded entirely upon negligence in failing to furnish a safe place of work could not have been successfully presented by an injured employee," is just plain silly. It assumes that the defense of assumption of risk would always be established as matter of law. Thousands of cases refute the argument.

On page 25 petitioner says that prior to 1939 actions to recover for injuries, "such as exemplified in the case at bar were usually founded upon a charge of negligence of employees and not upon a failure to furnish a reasonably safe place of work." This also is silly and without historical justification. As matter of fact, in the *Berry* case itself the case was submitted to the jury on the allegation that the Railroad "permitted plaintiff to alight from said caboose * * * although they knew * * * of the aforesaid condition" (i. e. the unguarded trestle).

Petitioner seeks to distinguish the *Berry* case by asserting that it was decided before the 1939 amendment of the F .E. L. A., which eliminated the defense of assumption of risk. That amendment in no way affects the *Berry* case. There is no discussion in the Berry case of assumption of risk. The case is decided on the ground that there was *no evidence of negligence on the part of the railroad* sufficient to be submitted to the jury. The Court in the *Berry* case had before it a case where the trestle involved had no walk *on either side.* It was a more dangerous situation than Pauly's. The Supreme Court in the Berry case stated that there was no evidence that Berry *could not have discovered* the danger by use of his lantern.

The evidence is stronger in the case at bar because it affirmatively shows that Pauly could have discovered the danger by the use of his lantern if he had used it or looked.

Petitioner in his brief repeatedly asserts that Pauly's failure to look for a safe footing bears only on the question of contributory negligence and not on the question of the defendants' negligence. But the Supreme Court in the *Berry* case shows the contrary by commenting upon the absence of evidence that Berry could not have discovered the danger by using his lantern and reaching the conclusion that if negligence caused the injury it was exclusively that of the respondent. The Supreme Court held that the Missouri court erred in permitting the case to go to a jury in spite of the fact that there was no evidence of negligence on the part of the railroad.

Petitioner argues that every vestige of the defense of assumption of risk was wiped out by the 1939 amendment and cites cases to that effect. No citation of authority is necessary. Respondents cannot and do not make any contention to the contrary.

On page 26 Petitioner attempts to avoid the authority of *Kenney* v. *Boston and Maine R. Co.* by asserting that the bridge involved was not a work place and claims that if it had been shown in the *Kenney* case that trains were customarily stopped upon the bridge that the holding would have been otherwise. The New Hampshire court would say the same of Pauly's case. There was more reason in the Kenney case than in Pauly's case to say that the bridge was a place of work. The bridge involved in the *Kenney* case was very near to the railroad station in Merrimac. The railroad was double tracked; there was a siding known as the McElwain Siding; another siding called the Excelsior Siding and there was a railroad station building. Merrimac was a place where industry was carried on. There was a factory called the Excelsior factory. Chacra, of course, had no industry, no siding, nothing but a passing track.

Petitioner seeks to distinguish his case from the *Kenney* case by saying that he was in the course of his duties when he alighted from the caboose. But Kenney was on duty and it is not to be presumed that he descended out of whim or caprice.

As is pointed out in the Bly case, Kenney was entitled to the presumption that he was acting with due care.

Petitioner seems to concede the applicability of the *Sudduth, Hathcock, Marinko* and *Shirer* cases by making no effort to distinguish them.

No authority supports petitioner's contention.

He relies primarily on *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 87 L. Ed. 1030, 63 S. Ct. 1062. The difference between the two cases is pointed out above.

A recent case which distinguishes the *Bailey* case on facts much like those in the case at bar is *Kenney* v. *Boston & Maine R. R.*, 33 Atl. (2d) 557 92 N. H. 495.

The facts are fully stated supra. The plaintiff contended that the Railroad was negligent in not providing the bridge, as a work place, with a cat walk and a rail. The Supreme Court of New Hampshire held as matter of law that there was no duty on the part of the railroad to anticipate that Kenney would use the bridge as a work place. The court said on page 560:

> Considering the circumstances of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge.

In addition to the *Bailey* case, Petitioner relies on *Cawman* v. *Pennsylvania-Reading Seashore Lines*, 110 Fed. (2d) 832, (3rd C. C. A.), *Bly* v. *Southern Railway*, 183 Va. 162, 31 S. E. (2d) 564, rehearing denied, 183 Va. 406, 32 S. E. (2d) 659; *Bimberg* v. *Northern Pacific Railway Company*, 217 Minn. 187, 14 N. W. (2d) 410, (certiorari denied, 323 U. S. 752, 89 L. Ed. 602, 65 S. Ct. 87; *Rashaw* v. *Central Vermont Railway, Inc.*, 133 F. (2d) 253 (2 C. C. A. 1943); *Murphy* v. *Boston and Maine Railroad*, Mass. 65 N. E. (2d) 923.

Cawman v. *P.-R. S. Lines*, 110 Fed. (2d) 832 (3rd C. C. A.) 1940 is not helpful because the facts involved are not dis-

closed. It is impossible to tell whether the trestle was on the main line or on a siding or in a station. For aught that appears it may have been in a place where there was a clear duty to anticipate danger to an employee in a place of work. The Supreme Court of New Hampshire in the *Kenney* case supra so declares on page 560:

> The plaintiff relies upon Cawman v. Pennsylvania-Reading Seashore Lines, 3 Cir., 110 F. 2d 832. The facts are so meagerly stated in that case that it is impossible to know how it fits into the grouping of authorities. We can do no more than assume that it is consistent with the rule above stated. *As it stands, it proves no more than that under some circumstances a bridge may be found to be a workplace for a freight brakeman, and as such it ought to be railed.*

The Supreme Court of Utah took the same view of the Cawman case (R. 181).

The *Cawman* case asserts on page 834 that the *Berry* case involved only failure of *personnel*, not failure of *material*. But so did the *Berry* case. It involved an injured plaintiff who might not have been injured if there had been a walk and rail. This necessarily involves "failure of material,"—but not the breach of any legal duty with respect to material because the court on page 512 expressly negatives the existence of any negligence:

> * * * If negligence caused the injury, it was exclusively that of the respondent. Proof of negligence by the railroad was pre-requisite to recovery under the Federal Employers' Liability Act. (45 USCA Secs. 51-59.)

The *Bly* case is readily distinguishable because it is within the doctrine of the Bailey case. Bly had to dismount from the caboose for the purpose of back flagging; the caboose steps extended out beyond the edge of the trestle on both sides; Bly, encumbered with his signaling impedimenta, had to swing around the end of the caboose platform from the steps in order to get on to the bridge. He fell down under the steps of the caboose where it had stopped and was killed. The court in-

dulged the presumption of due care applicable in death cases and not applicable in such cases as Pauly's, where Pauly took the witness stand and testified that he did not use any care whatever. He could have descended between the tracks on a perfectly safe bridge.

The *Bimberg* case is within the doctrine of the *Bailey* case. The decedent under direction from his superior was working on the bridge, using a lining bar to straighten the railroad track. He could not be elsewhere.

In the *Rashaw* case it was necessary for the deceased brakeman to cross the bridge as he did cross and the bridge was not in standard condition, that is, it was under repair and was covered with ice.

In *Murphy* v. *Boston and Maine R. Co.*, the court assumed that decedent fell from a sea wall along which he necessarily had to pass to reach his engine, unprotected by a guard rail. Upon that assumption it is like the *Rashaw*, *Bly* and *Bimberg* cases as distinguished from the *Kenney* and *Berry* cases and the case at bar.

There is no evidence that the absence of lights and markers on the bridge constituted negligence.

The allegation regarding lack of lights and markers comes to nothing because there is no evidence that the Denver and Rio Grande Western or any other railroad in the United States has ever maintained lights or markers in such position.

Ventura and Linkins testified on direct examination that there were no lights on the bridge. On cross-examination Ventura testified that there never are any lights on bridges or along passing tracks; that it is always left to trainmen to see conditions by their lanterns; and that railroads furnish electric lanterns, batteries and light globes for their use. (R. 44.) Linkins also on cross-examination testified that railroads never have lights on bridges to illuminate the bridges. (R. 73.) There is no evidence to the contrary of that of Ventura and Linkins. But it must be remembered that in this case Pauly didn't look. What good would lights on a bridge do for a man who doesn't

look? Pauly had a lighted electric lantern and a burning yellow fusee with him. Either was sufficient to illuminate the bridge and disclose the conditions. He used neither. Petitioner has laid no stress on this point.

III

The Supreme Court of Utah correctly held that there was no reason why the Railroad, in the exercise of reasonable care, should have anticipated that an experienced Conductor would step off a Caboose without looking and provide facilities to catch him.

Herein of Petitioner's Point III.

The Utah Supreme Court reaches this conclusion at R. 189, 190. Petitioner expresses consternation at such a holding. It is elementary in the laws of torts. This court recently reiterated the doctrine.

Brady v. *Southern Ry. Co.*, 320 U. S. 476, 88 L. Ed. 189, 64 S. Ct. 232.

The court held that it was not reasonably to have been anticipated that the condition of the derailer and worn rail would cause the accident. On page 483 the court said:

> * * * *Bare possibility is not sufficient.* Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, at page 475, 24 L. Ed. 256; "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury *it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Events too remote to require reasonable provision need not be anticipated.*

On page 484 the court said:

> * * * Here the rail was sufficient for ordinary use, and the carrier was not obliged to foresee and guard

> against misuse of the derailer, even though the misuse occurred as often as the evidence indicated. It was the wrongful use of the derailer that immediately occasioned the harm. Decedent had first closed and then opened the derailer on the first movement. He signalled the train to back into the storage track just before the fatal accident. Although this misuse of the derailer was an act of negligence, it is mere speculation as to whether that negligence is chargeable to the decendent or another. Without this unexpected occurrence, the adequacy of the rail vis-a-vis a properly used derailer is unquestioned. It was entirely disconnected from the earlier act of the carrier in placing the weak rail in the track. *The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.*

It is well settled law, as stated in the Brady case, that in determining whether a defendant is guilty of negligence, it is necessary that he anticipate only such possibilities as may be reasonably expected.

Kenney v. *Boston & Maine R. R. Co.*, 33 Atl. (2d) 557, 92 N. H. 495, applied this well settled principle of law. On page 560 the court said:

> Considering the circumstance of the distance of the bridge from the two switches, there is not the slightest evidence that the defendant or any of its agents or employees should have anticipated that the deceased in the course of his duties would have occasion to alight upon the bridge. As far as appears, he had occasion to alight on the main track only at the switches and station. The test of the duty of the defendant to make the bridge safe as a work-place being anticipation (cf. D'Ambrosio v. Boston & M. R. R., 81 N. H. 119, 124 A. 551) no duty in that respect can be found. The bridge was not a workplace in the sense that might perhaps have been found if the shifting operations were likely to result in a car standing on the bridge.

A. T. & S. F. Ry. Co. v. *Calhoun*, 213 U. S. 1, 53 L. Ed. 671, 29 S. Ct. 321. On page 9 the court said:

> * * * It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. *It has been well said that "if men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible human affairs could not be carried on at all.* The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." Pollock on Torts, 8th ed. 41.

And on page 10:

> * * * There was a wooden platform by the track at the station 100 feet more or less in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity, much less that a person would take a helpless infant and while thus running attempt to place it on the train. *We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence.* For these reasons the judgment must be reversed.

It has been repeatedly so held by courts of highest authority.

Fort Smith Gas Co. v. *Cloud*, 75 Fed. (2d) 413 (8th C. C. A.);

Kansas City So. Ry. Co. v. *Pinson*, 23 Fed. (2d) 247 (5th C. C. A.);

Virginia Ry. Co. v. *Station*, 84 Fed. (2d) 133 (4th C. C. A.);

C. St. P. M. & O. Ry. Co. v. *Elliott*, 55 Fed. 949 (8th C. C. A.);

St. Mary's Hospital v. *Scanlon*, 71 Fed. (2d) 739 (8th C. C. A.);

Davis v. *Schroeder*, 291 Fed. 47 (8th C. C. A.);

Waters-Pierce Oil Co. v. *Deselms*, 212 U. S. 159, 53 L. Ed. 543, 29 S. Ct. 270;

Richmond and Danville R. Co. v. *Elliott*, 149 U. S. 266, 37 L. Ed. 728, 13 S. Ct. 837.

This Court said in the *Brady* case on page 484:

> *The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.*

It would not be reasonable to require that the railroad should anticipate and guard against such extraordinary conduct and events as are here involved. Pauly knew that he was in the immediate vicinity of this very bridge. (R. 108.) He knew that it had a safe platform between the tracks on the north side. (R. 106, 107.) He knew that there was no walk or handrail on the south side of the caboose. (R. 106, 107.) He thought about the danger of the bridge a very short time before he stepped off, (R. 108) and then stepped off without looking (R. 133-135) although he had adequate means to see. (R. 52, 62, 91, 157.)

He was working under a rule which required him to look for a safe footing before he descended. (R. 7, 132.) He knew about this rule (R. 132), and that he was supposed to obey

it (R. 130). If he had obeyed this rule the injury would not have occurred.

He could easily have seen the danger if he had looked. He had a burning yellow fusee (R. 91) and a lighted electric lantern in his hand. (R. 91.) Either one furnished ample light for him to have seen, if he had looked, that he was stepping off into space. (R. 52, 62, 157.) By the light of his yellow fusee Pauly could have seen clearly 25 to 30 feet. (R. 56.) Ventura testified that a yellow fusee gives a little darker light than the light in the court room (R. 62) which was a 300 watt light. (R. 157.) The fusee and lantern are in evidence.

There was no reason why he should not have descended onto the platform between the tracks. There was seven or eight feet clearance between the tracks even if both were occupied by trains. (R. 50.) There was no train on the passing track.

Pauly alleged in his complaint that he could not safely step down on the north side of the train because Train No. 20, a passenger train, was then passing and that it would have been unsafe to descend between a standing train and a moving train. (R. 3.) At the taking of the deposition Pauly testified that Train No. 20 passed him in its entirety while he was still on the rear or east platform of the caboose, that while there standing he checked the train and all of the equipment in it, and that only after it had passed him did he reenter the caboose, put on his coat, light his lantern, walk to the front or west end of the caboose, light his fusee and then step down on the left or south side of the caboose into space without looking. (R. 163, 164, 168.) At the trial Pauly attempted to change his evidence on direct examination by saying that he was on the front end when Train No. 20 passed him. (R. 89.) On cross-examination, however, Pauly again admitted, and his final testimony was, that he was on the rear platform when Train No. 20 passed him. (R. 123, 126, 127, 128.) Such was also the evidence of Ventura who testified that when he dropped off the caboose the engine of No. 20 was about at the caboose. (R. 53.) When he dropped off, his train was going three to four miles per hour. (R. 51.) Train No. 20

consisted only of an engine, mail car, baggage car, day coach and sleeper. (R. 54.) When Pauly got off, his train had come to a stop.

There was no train other than Train No. 20 on the passing track. (R. 128, 164.) Ventura met no other train when he walked up to meet the head brakeman and then walked back (R. 49), although he walked some 1200 feet in each direction. (R. 46.) It would necessarily follow that when Pauly stepped off the front end of the caboose, there was no train on the passing track.

But even if there had been a train on the passing track as well as on the main line track there would still be 7 or 8 feet clearance between the trains (R. 50), which would have been ample. (R. 49.) Pauly could have discovered the sticking brakes just as well on the north side as the south side. He attempted to justify his act of descending on the left or south side of the caboose because when he saw the fire flying from the car 15 or 20 car lengths ahead the fire was seen on the left or south side. He could see the fire on that side because the train was then on a curve to the left. This made it possible to see the train ahead of the caboose on the left or south side and impossible to see the side of the train ahead of the caboose on the north or right hand side. (R. 85-87.) It is uncontradicted in the record that when one brake on a certain truck of a freight car is sticking, that all four of them are sticking. (R. 49, 148-150.) This is necessarily so because they are controlled by the same levers and brake cylinder. (R. 49, 148-150.) Thus the truck on which the brakes are sticking and throwing fire can be detected from either side of the train. Thus Pauly and Ventura had just as much reason to expect to find the sticking brakes on the north side as the south side of the train. (R. 49.) Moreover, it is demonstrated in this case that the sticking brakes could have been found on the north or right hand side after the train stopped because Ventura, when he went west after the accident, walked between the main line track and the passing track over the safe foot walk and found the sticking brakes from that side. (R. 46, 58, 59, 60.) He detected it by smoke from the wheels. (R. 60.)

Pauly also attempted to justify his getting down on the south or left side by saying that if he got off on the right or north side he would have had to cross over the draw bars when he came to the car with sticking brakes. This was not pleaded (R. 3) and was merely an afterthought. Pauly testified unequivocally in his deposition taken August 1, 1944, that he stepped down without looking. (R. 167.) At the trial on September 25, 1944, he attempted on direct examination to testify that he did look (R. 92, 95), but on cross-examination once more admitted, and his final testimony was, that he did not look. (R. 133, 134, 135.) Pauly testified that when his deposition was taken he was in full possession of his faculties, suffering no pain and not confused. (R. 103, 104.)

Even though he testified on direct examination that he looked down before he dropped off, yet by his own admission he did not look effectively because he didn't use his burning fusee or his lighted lantern to examine what he was dropping on. He made the ridiculous excuse that the fusee and lantern are not for that purpose. (R. 139, 140), although later he admitted they were for that purpose. (R. 144.) Ventura, who descended only a few seconds before Pauly, used his lantern and saw from its light alone that he was dropping on to a safe footing. (R. 53.)

In spite of all this Pauly stepped off the front of the caboose on the south side and without looking. This could not be reasonably anticipated. This was not a chain of reasonably foreseeable events.

Petitioner argues that the railroad should reasonably have anticipated that employes would descend from the train on the south side and that the injury would result because there were no lights, walkways or guard rails. That contention disregards the all important facts that Pauly, an experienced conductor in charge of the train, thoroughly familiar with the rule requiring him to look for a safe footing, knowing that he was in the immediate vicinity of the bridge and might be on it, and with a lantern and fusee which would have enabled him to see, nevertheless stepped down without looking. Plaintiff's argument would require a railroad to take

precautions against trainmen stepping off trains without looking at any place on the railroad.

Petitioner's contention comes to this, that the railroad should anticipate that an experienced conductor, with seventeen years experience as a railroad trainman, knowing of the rule that he must look for a safe place to alight before stepping off trains, would in violation of that rule, and with ample facilities to see, knowing that he was near and might be on the bridge, step off the train without looking, and that the railroad should have either a walk with a rail to catch him or hang life nets over the edge of the right of way if nothing else would be feasible.

Petitioner argues that the south side was the safe and proper side from which to alight. His own evidence proves that that was not his judgment. He thought about the bridge and thought he had passed it. (R. 108, 109.) After the accident he exclaimed that he thought he was past the "darned bridge." (R. 51.) Except for his mistake or inadvertence, the inference is clear that he wouldn't have stepped down on the south side but would have stepped down on the platform to the north.

Pauly's complaint recognizes that he would not have dismounted on the south side but would have used the safe passage way over the creek on the north side of his train except that he alleged that train No. 20 was passing. His only allegation explaining why he chose to step off on the south side is that Train No. 20 was passing and therefore it was dangerous to get off on the north side. (R. 3, 4.) As the record demonstrates Train No. 20 had passed. When he dismounted that danger did not exist.

Throughout his brief petitioner argues that if the bridge at Chacra had had guard rails or a walkway or lights on the south side the petitioner would not have been injured. This is the typical "hind sight" argument which runs all through petitioner's brief—the defendant was negligent because the place of work must have been dangerous because petitioner fell and if the place had not been dangerous petitioner would not have fallen. It reasons in a circle and begs the question. Moreover, it is pure speculation to assert that Pauly would not

have been injured if there had been a walk and rail. It would depend on how wide the walk might be, the position of the rail, and how he stepped and landed. It is within the realm of reasonable possibility that he might have received just as bad injuries as in fact he did. A walkway and rail are designed to walk on, not to catch experienced conductors who fall without looking.

IV

The Supreme Court of Utah correctly held that a verdict should have been directed because the sole cause of the accident was Pauly's own negligence.

Herein of Petitioner's Point IV.

Petitioner on page 45 complains that the Supreme Court of Utah held as matter of law that Pauly's negligence was the sole *proximate* cause of the accident. The Utah court states at R. 189 that the Railroad made such a contention, but reasons that, if the railroad was negligent in failing to equip the south side of the bridge with a walk and railing, such negligence would be concurring negligence and that therefore, "we are referred back to the fundamental question under consideration, viz., whether the (railroad) owed any duty to plaintiff under the circumstances of this case." At R. 189-190 the court said:

> If the appellant had a duty to construct a platform on the bridge on the south side of the main line in order to intercept the drop of the respondent or, put in another way, to make it safe for him to get off regardless of his care or lack of care, then failure to do so was negligence which negligence, since it failed to preserve the respondent safe from his own lack of care, was a concurring cause of the accident and his negligence was not the sole cause. If, on the other hand, the appellant did not owe such duty, it was not negligent in not so constructing the platform and there being no negligence which concurred in or contributed to the respondent's negligence, his negligence was the *sole proximate cause.*

It will be observed that although the court used the expression, "sole *proximate* cause," its reasoning demonstrates that it was dealing only with the question of whether the Railroad was guilty of any negligence and concluded that it was not guilty of any negligence and therefore the sole negligent cause was that of the petitioner. The reasoning of the Utah court is not that the railroad and petitioner were both negligent and that the petitioner's negligence was proximate and the railroad's remote and that therefore the sole proximate cause of the accident was the petitioner's negligence. Its reasoning is that the railroad was not guilty of any negligence and therefore the petitioner's negligence was the sole cause of the accident.

Baltimore & O. R. Co. v. *Berry*, 286 U. S. 272, 76 L. Ed. 1098, 52 S. Ct. 510, supports this conclusion. On page 512 the court said:

> * * * If negligence caused the injury it was exclusively that of the respondent. Proof of negligence by the railroad was prerequisite to recovery under the Federal Employers' Liability Act (45 U. S. C. A. Secs. 51-59).

The judgment of the Supreme Court of Utah can also be supported upon the ground that Pauly's negligence made any negligence by the railroad remote.

If negligence of respondents was not a proximate cause and if the sole proximate cause of the accident was petitioner's own negligence, there can be no recovery under the F. E. L. A.

This Court in the *Brady* case said on page 484:

> The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events.

Under the test laid down by the *Brady* case the question is whether the alleged negligence of the railroad in not having a footwalk and handrail on the south side of the bridge, in addition to the platform on the north side, is a link in an unbroken chain of reasonably foreseeable events. If the chain of events was not reasonably foreseeable by the railroad, its

failure to have a footwalk and handrail is not the proximate cause of the accident. Is it reasonably foreseeable that Pauly would behave as he did. If not, then the undoubted negligence of Pauly in violating rules of the company and stepping off the caboose without looking was the sole proximate cause of the accident.

Is it reasonable to require the railroad to foresee that Pauly would violate its rule? Is it not reasonable for the railroad to anticipate that Pauly would comply with its rule? If Pauly had complied with the rule this accident would not have occurred. If he had looked out for a safe footing before stepping down from the caboose, as required by Safety Rule 3, he would not have been injured.

Kenney v. *Boston & Maine R. R.*, 33 Atl. (2d) 557, 92 N. H. 495. The facts are stated under II. On Page 561 the court said:

> * * * *If he had known where he was and had stepped off as he did, his negligence would have been the sole proximate cause of his injuries and death.*

No one would contend the contrary. But Pauly knew where he was. He knew that he was in the near vicinity of this bridge. He thought about the bridge and the danger of it when he was in the caboose just before he went to the front platform and stepped off. To be sure, he thought he was three or four car lengths past the bridge. Of course, he could not be certain of that and knew that he could not be certain of it. Nevertheless he stepped off the caboose without looking. It is submitted that Pauly's negligence was the equivalent in legal effect of stepping of the caboose in spite of the fact that he knew where he was, and that his behavior is within the well established doctrine stated by the *Kenney* case.

For those reasons Pauly's violation of the safety rule was the sole proximate cause of the accident.

CONCLUSION

It is respectfully submitted that the judgment of the Supreme Court of Utah directing the dismissal of the action correctly reflects the law as announced by this court with respect to the Federal Employers' Liability Act.

W. Q. VAN COTT,
DENNIS MCCARTHY,
Attorneys for Respondents.

No. 443. PAULY *v.* MCCARTHY ET AL., TRUSTEES. Certiorari, 329 U. S. 698, to the Supreme Court of Utah. Argued March 6, 1947. Decided March 10, 1947. *Per Curiam:* Judgment reversed. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649. *Parnell Black* argued the cause for petitioner. With him on the brief were *Calvin W. Rawlings* and *Harold E. Wallace*. *W. Q. Van Cott* argued the cause for respondents. With him on the brief was *Dennis McCarthy*. Reported below: 109 Utah 398, 166 P. 2d 501.